TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 539

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, APPELLANT,

vs.

E. V. KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED SEPTEMBER 10, 1923

(29,849)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1923

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[fol. 1] NAMES AND ADDRESSES OF SOLICITORS

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Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington, solicitors for appellees.

[fol. 2] IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No.167 E

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation, Plaintiff

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants.

BILL OF COMPLAINT—Filed April 24, 1923

To the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Home Telephone and Telegraph Company of Spokane, a corporation organized and existing under the laws of the State of Washington, brings this, its bill of complaint, against the defendants, and thereupon complains and charges as follows:

[fol. 3] I. That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having

its principal place of business at Spokane, in said state, and is a citizen of said state. That during all of the times referred to in this bill of complaint it has owned and operated, and now owns and operates, a telephone system and has been, and is now, engaged in operating and conducting a public telephone system in the City of Spokane and the territory adjacent thereto, referred to herein as the Spokane Exchange.

II. That the defendant E. V. Kuykendall is the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen and resident of the Eastern District of Washington; that the defendant Hance H. Cleland is the duly appointed, qualified and acting Supervisor of Public Utilities of said state, and is a citizen and resident of the Eastern District of Washington; that the defendant Frank R. Spinning is the duly appointed, qualified and acting Supervisor of Transportation in said state and is a citizen and resident of the Western District of Washington. That said [fol. 4] E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning are the members of and constitute the Department of Public Works of the State of Washington. Said defendants will be hereinafter referred to as the Department. That the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney General of the State of Washington, and is a citizen and resident of the Western District of Washington.

III. This suit is of a civil nature in equity and is brought for the purpose of enjoining the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the City of Spokane and the territory adjacent thereto, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public, and, in consequence, said order seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment of the Constitution of the United States, and is therefore null and void.
[fol. 5] The amount in controversy in this suit exceeds the sum or value of $3,000, exclusive of interest and costs.

IV. That on August 8, 1919, the Public Service Commission of Washington, an administrative body duly created by the statutes of said state, and the predecessor of, exercising like powers as, the said Department of Public Works, made an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, in the Spokane Exchange. A copy of said rates is filed herewith, marked Exhibit "A" and hereby specially referred to and made a part hereof.

V. That on September 20, 1922, plaintiff filed with the said Department a schedule of rates increasing the rates to be charged by plaintiff for exchange telephone service in said Spokane Ex-

change. A copy of said schedule is filed herewith, marked Exhibit "B" and hereby specially referred to and made a part hereof.

VI. That on September 24, 1922, the said Department issued [fol. 6] an order suspending for the full statutory period the operation of said rates so filed by plaintiff on September 20, 1922.

VII. That subsequent to the dates hereinbefore mentioned said Department held hearings in the City of Spokane for the purpose of determining the value of plaintiff's property used and useful in rendering telephone service therein; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said exchange; and the reasonableness or unreasonableness of the schedule of exchange rates for the Spokane Exchange filed by it as aforesaid on September 20, 1922. That on the 31st day of March, 1923, said Department made an order, a copy of which is fi*e*ld herewith, marked Exhibit "C" and hereby specially referred to and made a part hereof, determining the value of plaintiff's property used for the public convenience in rendering telephone service in the Spokane Exchange as of June 30, 1922. That on the 31st day of March, 1923, two of the three members of said Department made an order, a copy of which is filed herewith, marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby the application of plaintiff to increase its rates for telephone service [fol. 7] in said Spokane Exchange was denied. That on the same date, to-wit, March 31, 1923, the Supervisor of Public Utilities and a member of said Department, who was present at all of said hearings, filed a dissenting opinion, a copy of which is fi*e*ld herewith, marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates then and theretofore being charged by plaintiff in its Spokane Exchange were unreasonable and less than sufficient, and in which he fixed certain rates as reasonable and not more than sufficient. That said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in said dissenting opinion, Exhibit "E," are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff proposes to establish and make effective pending the final decree in this cause.

VIII. The cost to plaintiff of its property in the Spokane Exchange (land being included at present value), now being used or useful in furnishing telephone service to the public therein and exclusively devoted to the rendition of that service, was, as of the [fol. 8] 31st of December, 1922, the sum of $4,266,899. That the cost to plaintiff of its said property in said Spokane Exchange is now somewhat in excess of that amount on account of additions and betterments in the meantime made thereto. That the cost to plaintiff of its property in the Spokane Exchange is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments made thereto since that time. The present cost

of reproduction of said property as it existed on the 31st day of December, 1922, is the sum of $8,039,784. That the cost of reproduction of said property less depreciation as of the 31st day of December, 1922, is the sum of $7,382,484. The fair and reasonable value of said property for said Spokane Exchange is the sum of $5,710,684.

The foregoing statements as to the cost to plaintiff of said property include nothing on account of the item of franchise, or the item known as going concern value, but said latter item has been considered in the present cost of reproduction and the present fair and reasonable value of said property.

[fol. 9] IX. The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

X. That the plaintiff's telephone business in the Spokane Exchange has been conducted efficiently and economically during all of the times herein referred to. Plaintiff's net earnings derived from its telephone business within the Spokane Exchange as stated in rate per cent annual return on the cost of the property on the one hand and on the fair value thereof on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods stated have been as follows:

	On cost	On fair value
Year 1919	2.95%	2.14%
Year 1920	1.79%	1.30%
Year 1921	2.35%	1.71%
Year 1922	3.07%	2.28%

[fol. 10] At all of the times aforesaid the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XI. That the rates of plaintiff in the Spokane Exchange established and in force, as herein set forth, during the years, 1919, 1920, 1921 and 1922, and which are in effect under the order of said Department of March 31, 1923, were and are not compensatory, and were and are less than just and reasonable rates. That the amounts by which the net revenue derived by the plaintiff from its telephone business in the Spokane Exchange were less than eight per cent of the cost of the property used and useful and exclusively devoted to the rendition of service within said exchange were for the

Year 1919	$193,042
Year 1920	237,883
Year 1921	219,784
Year 1922	202,655

XII. That the maintenance of the rates and charges as aforesaid in Exhibit "A" under the order of said Department of March 31, [fol. 11] 1923, compels the plaintiff to provide service at rates which are not compensatory and which are less than just and reasonable, and results in the confiscation of the property of plaintiff in the Spokane Exchange devoted to public use, and deprives plaintiff of its property without compensation and without due process of law and denies to it the equal protection of the laws, in violation of the Constitution of the United States, particularly Article Fifth and the Fourteenth Amendment thereof. That said order of March 31, 1923, is therefore null and void. That if said order of March 31, 1923, is enforced and plaintiff is compelled to charge the rates therein prescribed, and if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial results will be as follows: Plaintiff will be prevented from earning any return in excess of 1.88 per cent per annum upon the fair and reasonable value of said property in said exchange. That had the rates set forth in Exhibit "F," being the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair, reasonable and sufficient, been in effect for the year 1923, the return of plaintiff thereunder on the fair value of its property would have been 5.52 per cent, and [fol. 12] for the same period upon the cost of its property in said Spokane Exchange, as found in said dissenting opinion, of 7.64 per cent. And plaintiff avers that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which it is lawfully entitled, but plaintiff proposes to establish and put into effect said rates and charges pending the final decree in this cause.

XIII. That the plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F", or any rates or charges higher than those specified in said Exhibit "A", or any rates not sanctioned by the Department of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A", and the plaintiff, its directors, officers, agents and employees will be subjected to a multiplicity of suits and incur the penalties and punishments prescribed by the laws of the State of Washington, and may, under the provisions of said laws, be charged with the commission of [fol. 13] gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000, or imprisonment in a county jail of one year, or both.

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedules of rates and charges in said Exhibit "F", or any rates and charges other than those provided in said Exhibit "A",

and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as hereinbefore alleged.

That unless the defendants are restrained and enjoined, as herein prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A". That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at [fol. 14] law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no practical way to enforce and collect its rates and charges except by cutting off and refusing service for default in payment of its bills rendered monthly therefor, and its subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits to restrain plaintiff from cutting off and denying service for such non-payment of bills and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.

That large numbers of suits will be brought by defendants and plaintiff's subscribers and patrons to restrain an- enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F" or any schedule other than said Exhibit "A", and to compel plaintiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A". That the issues which will be presented in each said suit are presented and should and will be decided in this action.

[fol. 15] Wherefore, the plaintiff prays the judgment and decree of this Court:

First. That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of Public Works, be decreed to be confiscatory, in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect.

Second. That defendants, and each of them, and all other persons be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A" filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges.

Third. That defendants, and each of them, and all other persons be temporarily and permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect said schedule Exhibit "F" and charging and collecting the rates [fol. 16] and charges therein set forth until just and reasonable schedules of rates and charges are established according to law.

Fourth. That the defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges, Exhibit "A," or putting into effect any schedule of rates and charges not in excess of those set forth in Exhibit "F".

Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of supœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the said E. V. Kuykendall, Hance H. Cleland, Frank R. Spinning and John H. Dunbar, commanding them, and each of them, on a day certain to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises and to perform and abide by such orders, direc-
[fol. 17] tion or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

And the plaintiff wil ever pray.

The Home Telephone and Telegraph Company, of Spokane,
By Otto B. Rupp, Post, Russell and Higgins, Pillsbury, Madison & Sutro, Its Solicitors.

[fol. 18] Jurat showing the foregoing was duly sworn to by J. C. Nowell omitted in printing.

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Wash., Effective August 1, 1919

W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane, Spokane County, Washington

Business—Unlimited Service

[fol. 19] EXHIBIT "A" TO BILL OF COMPLAINT

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.75
Two-party Line	...	...
Extension (with or without bell)	1.00	1.00
Suburban Service, Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

Individual Line	3.25	3.50
Two-party Line	2.50	2.75
Four-party Line	2.00	2.25
Extension (Without Bell)	.50	.75
Extension (With Bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map **

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

[fol. 20] ** Opportunity Exchange—Two mile radius from central office.

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane, Spokane County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.04
Auxiliary Line	2.50	2.75	...	...
Extension (With or without bell)	.75	.75	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (Without bell)	...	...	...	...
Extension (With bell)	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
Extension (With or without bell) per month.....	1.00	1.00	...	...

*25c per month additional.

[fol. 21] Residence—Coin Box Service

Individual Line	...	...	...	...
Extension (Without bell) per month	...	...	...	...
Extension (With bell) month.....	...	...	...	...

Issued: April 1 ,1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2.00
Additional switchboard equipment for each group of 5 lines or less	.20

First bothway trunk line—Indi-idual business rate plus $2.00 per month.

Each additional bothway trunk line—Rate for first bothway trunk line less 25%.

Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.

	Wall set	Desk set
Each station, primary or extension, not in guest rooms (See Mileage Rates, Section 3)	$1.00	$1.00

[fol. 22]

Each station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: April 7, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month
Switchboard with battery power, ringing circuit and switchboard telephone for each position	None.
Trunk Lines—Bothway only	None.
(Enough bothway trunk lines will be provid- to properly handle the traffic)	
Each exchange message	$.025

[fol. 23]

	Wall set	Desk set
Each station, primary or extension, not in guest rooms (See Mileage Rates, Section 3)	$1.00	$1.00
Each station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Ten (10) stations, excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside primary Rate Area, see Mileage Rates, Section 3.

Issued: April 1, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

W. P. S. C. No. 2, Section 3

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Farmer Line Service

Total Number of Stations

	Rate per year
300 stations or less	$3.00
300 to 500 stations	3.60
500 to 750 stations	4.20
750 to 1,000 stations	5.40
1,000 to 2,000 stations	7.20
2,000 to 4,000 stations	8.40
4,000 to 6,000 stations	9.60
6,000 to 8,000 stations	10.80
8,000 to 12,000 stations	12.00
12,000 stations and over	15.00

[fol. 24] Company Furnishes.—For not less than 5 subscribers per circuit, switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes.—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes facilities to city or town limits. Complete telephone and battery, sub-station protection. Maintenance of above.

The subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers will be subject to a Ten Per Cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

Issued: April 1, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

[fol. 25] EXHIBIT B TO BILL OF COMPLAINT

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Wash., Filed September 20, 1922, and not Withdrawn

W. D. P. W. No. 3, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane and Opportunity, Spokane County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (With or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Sec. 3)	3.50	3.75

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (With or without bell)	.75	1.00	...	...

[fol. 26] Semi-public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05
*25c. per month additional.			
Extension (With or without bell) Per month	1.00	1.25	....

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two-party Line	3.25	3.50
Four-party Line	2.75	3.00
Extension (With or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area, See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

*Opportunity Exchange—Two-mile radius from central office.

Farmer Line Service (See Section 3), each station, $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.
Cancels and supersedes Exchange Rate Schedule effective April 1, 1919.

G. A. Walker, Assistant Secretary.

W. D. P. W. No. 3, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private [fol. 27] branch exchange service subject to the following conditions:

(a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

(b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchange service at published rates.

(2) To pay the hotel a commission on exchange interexchange messages originating at guest room and lobby stations and charged to the hotel.

	Rate per month
Switchboard with battery power ringing circuit, position dial, switchboard telephone, each position, Cordless type..	$3.00
Non-multiple cord type:	
10 lines or less in use	5.00
11— 30 lines in use	6.00
31— 60 lines in use	7.00
61—100 lines in use	8.00
101—150 lines in use	9.00
151—200 lines in use	10.00
201—260 lines in use	11.00
261—320 lines in use	13.00
[fol. 28] Multiple cord type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:

Each station, without dial—Wall Set	1.00
Desk Set	1.25
Each station, with dial—Wall Set	1.25
Desk Set	1.50

Stations outside premises in which switchboard is located, see Mileage Rates—Section 3.

(b) Station in guest rooms and lobby:

Each station, without dial—Wall Set	.50
Desk Set	.75
Each station, with dial—Wall Set	.75
Desk Set	1.00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests

when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

(c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management. Outgoing trunk lines only:

Individual line business unlimited rate.
Tie lines between separate switchboards—See Mileage Rates, Section 3.

[fol. 29] Both way trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the central office shall be five cents except that in those cases where the additional service rendered the public at the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accepted by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations cannot be connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate Area, see Mileage Rates, Section 3.

Issued: October 2, 1922, Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective April 1, 1919.

G. A. Walker, Assistant Secretary.

[fol. 30] EXHIBIT C TO BILL OF COMPLAINT

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

No. 5344

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and THE HOME TELEPHONE AND TELEGRAPH COMPANY of Spokane, Respondents.

Order Relating to Valuation of the Home Telephone and Telegraph Company of Spokane

General Statement

This matter arose thru the necessity for determining the valuation of the telephone property of The Home Telephone and Telegraph Company of Spokane (hereinafter referred to as the respondent) as a step in the department's state wide investigation of the telephone situation initiated by its complaint in this cause dated January 21, 1922.

[fol. 31] Hearings in this cause, pursuant to notice duly given, were held before the department in Olympia, December 18, 1922, and in Spokane on January 22, 1923, and February 28, 1923, at which hearings the department, the City of Spokane, the respondent and other parties were represented, witnesses were sworn and examined, documentary evidence was received, briefs being submitted and the department now being fully advised in the premises makes and enters the following findings of fact and order:

Findings of Fact

I. That The Home Telephone and Telegraph Company of Spokane was organized January 19, 1905. As of June 30, 1922, the date to which all of the following findings refer unless otherwise specifically mentioned, it is found to be owning and operating the telephone exchange plant within the City of Spokane and the rural territory immediately adjacent thereto, together with certain toll lines and facilities within the City of Spokane whereby respondent's subscribers may be connected to the toll lines of the Pacific Telephone and Telegraph Company at the city boundaries.

[fol. 32] II. The respondent by means of the property owned and operated by it renders telephone service to the citizens of Spokane for hire and it is therefore a public service company subject to the laws governing the regulation of all such companies by this Department.

III. For a time prior to 1915 two telephone companies operated in Spokane, one, the respondent, known as the "Home" or "Independent" company and the other, the Pacific Telephone and Telegraph Company, sometimes referred to as the "Pacific" or "Bell" company. During the year 1914 the Pacific Company acquired the capital stock of the Home Company and on January 18, 1915 sold its Spokane properties to the latter. The consideration in this transaction was as follows:

Thirty year 5% 1st Mortgage Bonds of the Home Company	$1,338,000.00
6% Promissory Note of the Home Company	1,147,927.66
Cancellation of Pacific Company indebtedness to the Home Company	329,600.00
Total	$2,815,527.66

[fol. 33] The property conveyed by the Pacific Company is subject to a mortgage given to secure an issue of bonds of the Pacific Company amounting to $35,000,000. The proportion of such indebtedness secured by the property conveyed was $1,500,000. The two properties were consolidated with the result that since 1915 only one company, the respondent, has given telephone service in Spokane. The Pacific Company, thru its stock ownership of the Home Company controls the operations of the respondent. In practical effect this situation places Spokane in the relation of an exchange of the Pacific Company.

IV. The cost of construction and equipment of the property embraced in the fixed capital accounts as derived from the books and records of respondent is $3,946,642.74. This figure differs from the amount now carried by the respondent on its books, which with minor adjustments is $3,467,675.01 and was obtained by adding the net additions since January 1, 1915, to a starting figure as of that date composed of the full book value of the Fixed Capital Accounts of the Home Company plus the "Structural" or "Physical Condition" [fol. 34] book value of the Pacific Company. The first figure stated above is derived from a starting figure as of the date of the consolidation composed of the actual book cost figures of the Fixed Capital Accounts of both companies. An amount of $2,116,247.69 carried by the respondent as "Miscellaneous Investments" is not considered in the above figures. The amount of $3,946,642.74, above stated, embraces all of the Fixed Capital Accounts, both exchange and toll, representing property owned by the respondent both used and not used for the public convenience. It therefore includes certain items of plant acquired in the consolidation, that should be eliminated from consideration in a rate base as not being used for the public convenience. This non-used plant will hereinafter be itemized in detail.

V. The present cost of construction, or what is the same thing, the cost of reproduction, of the respondent's telephone property used

and useful for the public convenience, is $6,900,000. This amount was arrived at by applying to an actual field inventory of plant units embraced in the Fixed Capital Accounts as of June 30, 1922, unit prices derived from a price trend study over a principal construction [fol. 35] period of three years, subsequent to the date of the inventory.

VI. The cost of reproduction of the property embraced in the fixed capital accounts, less accrued depreciation is $5,900,000. The property is found to be in approximately eighty-five per cent physical condition.

VII. The outstanding capital stock of respondent, all of which, with the exception of directors qualifying shares, is owned by the Pacific Telephone and Telegraph Company, amounts to a par value of $1,250,000, consisting of 12,500 shares of a par value of $100 each. The market value of this stock cannot be ascertained, there being no recent transactions to indicate its value.

VIII. The funded debt of respondent consists of an issue of First Mortgage 5 per cent, 30 Year Gold Bonds, to the par value of $3,000,000. There is no evidence to indicate the market value of these bonds.

[fol. 36] IX. The respondent has never paid any dividends on its capital stock.

X. As indicating the earning capacity of the respondent it is found that for the first six months of the year 1922 the telephone operating revenues were $607,131.64, and for the same period the telephone operating expenses, taxes, uncollectible revenue, and lincesee contract payment as shown on the company's books amounted to $542,576.22.

XI. The territory served by respondent comprises 43.7 square miles, containing a population of approximately 124,500. The company serves 31,257 exchange stations. The density of population is 285.2 per square mile and the percentage of telephone development (ratio of stations to population) is 25.11 per cent. The use of the telephone, as indicated by the number of calls per capita per year, is 490.56.

[fol. 37] XII. We find that the expenditures made by the respondent and its predecessors were such as were justified by the then existing conditions and conditions that might reasonably be expected in the immediate future. Likewise, the money expended has been reasonable for present needs and for the needs of the immediate future.

The property as it is found at this date is the result of the merger of two telephone plants as described in Finding III, and in view of that fact it is inevitable that some duplications of facilities would be found. During the period elapsing since consolidation most of these duplications have been eliminated. However, at the present time it is found that certain property, the book cost of which is included in

the amount stated in Finding IV, is either not useful in the public service or is not at the present time used for the public convenience. The land and buildings comprising old automatic offices B and C, the value of which, not including omissions but including interest during construction, is $12,020.01, are not and cannot be used in the public service. They are therefore excluded from the rate base which will be hereinafter found.

[fol. 38] Certain underground plant was found not in use at the time of the inventory and a portion of this plant is so situated that it is admitted by the company it will never be used in the public service. The following table shows the items of plant just described.

Item	Potentially useful	Not useful
Exchange Underground Conduit, duct ft.	172,882	8,320
Manholes, number	78	7
Exchange Underground, Cable, wire Mi.	1455.50	0

The value of the foregoing "not useful" plant excluding omissions but including interest during construction, is $5,025.63, which makes a total of $17,045.64 worth of property included in the company's fixed capital accounts which should be eliminated as not now and not likely to be useful in the public service.

The value of the foregoing underground plant which is classified as "potentially useful in the public service" is $109,866.50. From the evidence submitted we find that approximately $20,000.00 worth of this plant should be regarded as properly includible in the rate base since it is in the nature of a reasonable surplus of plant which [fol. 39] prudence dictates that all utilities should have. The balance, or $89,866.50, should not be included in a rate base fixed as of June 30, 1922, but the company is entitled to have such portions of this plant in excess of the $20,000.00 before mentioned as may in the future be placed in active service, included in subsequent rate bases. The facts with respect to this matter can be determined when necessary by using the detailed inventory of this plant to be found in the exhibit submitted by our engineers.

XIII. The respondent submitted what it designated an "Actual Performance Appraisal" of its properties. This is the same method of appraisal followed in the state-wide valuation of the Pacific Company on which an order was issued in Cause No. 1810-1825 in 1916. The inventory from which the appraisal was made was carefully checked by our engineers and the unit prices applied to the inventory in order to arrive at the appraisal amounts were likewise checked. These unit prices may be broadly described by the term "Historical Prices." They are derived from an analysis of the cost records of [fol. 40] the work actually done by the company in constructing the property being appraised. They are actual performance costs applying to the greater portion of the units covered by the inventory. Hence an appraisal on this basis should agree closely with the book cost of property. Excluding the respondent's allowance for omis-

sions from the actual performance appraisal, it is found that it is lower than the adjusted book cost of property by a relatively small amount.

There was some contention over the allowance of an item termed "Omissions" included by the respondent in its appraisal figures. The amount involved is $74,587.65, of which $318.69 relates to the non-useful property and $2,198.13 relates to the potentially useful property, all of which is listed in Finding XII, and which the company estimates should be allowed for omitted items. The Department's engineers took the position that a thorough check of the inventory had disclosed that it was accurate to a high degree and that the method of deriving unit prices fully covered any contingencies, therefore this item could reasonably be excluded, and it is excluded from the actual performance appraisal figures and rate base in this order.

[fol. 41] The cost of construction and equipment of the property embraced in the fixed capital accounts, estimated by the company on the actual performance basis not including the non-useful property but including the potentially useful property is as follows:

Intangible Capital:	
Organization	$1,200.00
Exchange Plant:	
Exchange Right of Way	10,087.59
Land	121,451.68
Buildings	433,653.17
Central Office Equipment	665,990.38
Station Apparatus	191,237.70
Station Installations	167,877.82
Interior Block Wires	6,634.73
Private Branch Exchanges	168,905.84
Booths and Special Fittings	1,965.93
Exchange Pole Lines	376,027.78
Exchange Aerial Cable	438,855.92
Exchange Aerial Wire	206,351.54
Exchange Underground Conduit	533,544.19
Exchange Underground Cable	391,859.06
Interest During Construction	47,031.73
Total	$3,761,475.06
[fol. 42] Toll Lines:	
Toll Right of Way	175.24
Toll Pole Lines	24,704.52
Toll Aerial Wire	23,827.53
Toll Underground Conduit	205.33
Toll Underground Cable	25,371.90
Interest During Construction	1,099.41
Total	$75,383.93

General Equipment:

Office Furniture and Fixtures	28,971.27
General Store Equipment	155.28
General Stable and Garage Equipment	29,338.04
General Tools and Implements	13,357.37
Total	$71,821.96
Grand Total	$3,909,880.95

XIV. Some of the amounts stated in fixed capital accounts of respondent are not satisfactory as indicating the actual or true cost of the property included thereunder. The actual performance appraisal accounts as listed in Finding XIII are believed to indicate reliably the facts as nearly as they may be determined and respondent may, if it elects and obtains the necessary permission from the Interstate Commerce Commission, adjust its fixed capital accounts and [fol. 43] set them up in accordance with the values in Finding XIII.

XV. The Working Capital, as distinguished from Fixed Capital, required by respondent in conducting its business, amounts, as an average for the first six months of 1922, to $68,867.74. This amount is made up of accounts as follows:

Cash	$10,628.60
Employees Working Funds	6,091.83
Due from Subscribers and Agents	36,267.91
Materials and Supplies	15,879.40
Total	$68,867.74

"Cash" includes the amount of current funds available for use on demand. "Employees Working Funds" include amounts advanced to employees from which expenditures are made and subsequently accounted for. "Due from Subscribers and Agents" includes amounts due the company on account of services rendered. "Materials and Supplies" include the cost of unapplied material, including the value of materials temporarily in use but not charged out in the company's accounts and other supplies and approximate charges applicable thereto.

[fol. 44] The foregoing amounts are reasonable and the total should be included in the Rate Base upon which respondent is entitled to earn a reasonable return.

XVI. The item of Construction Work in Progress as of June 30, 1922, amounts to $3,117.81. This amount should be included in the Rate Base, but due allowance in computing a rate of return must be made by treating the accruals for interest during construction as a part of Income, adding the same to Operating Income before computing the rate of return.

XVII. All of respondent's property is located within the State of Washington. Such interstate business as it transacts is toll or long distance business over the lines of other telephone and telegraph companies and it is not feasible to make any *segr*-ation of its operations as between intrastate and interstate business.

XVIII. The respondent submitted an exhibit to show that the "Fair Value" of its property was $5,500,000. The exhibits of the [fol. 45] Department's engineers and experts for the City of Spokane discussed "Rate Bases" ranging around $4,000,000 and lower. Counsel for the City of Spokane, in his memorandum on the valuation of this property analyzes the exhibits of his experts and contends for the following formula to determine the rate base.

To the value of the Pacific (Manual) Company's property fixed by the Commission as of December 31, 1914, add the book accounts relating to the Home (automatic) Company's property when the plants were consolidated. Add net additions to plant, cash, employ-s working funds, and materials and supplies. Deduct value of property not actually in use.

This gives him a figure of $3,864,081.51 which he states in the "actual investment of the company in use." He then assumes the property to be in 90 per cent condition from which he obtains $3,477,673.36, which is the amount he contends for as the rate base.

The Department's engineers submitted an exhibit which, at page 13, shows a rate base using the same formula. The amount arrived at by using the figures of our engineers, which differ somewhat from [fol. 46] those of counsel, eliminating the non-useful property and all but $20,000 of the potentially useful property, is $3,958,081.66. This amount includes working capital and construction work in progress.

The method of using the depreciated value of the actual investment in property advocated by counsel for the City of Spokane has never been adopted by this Department, nor, so far as we are aware, do other regulatory bodies regard it with favor. The "cost of reproduction less depreciation" method is used by some, and with some reason as indicating—on a purely physical basis—the "present value" of a property. It has been previously found herein that this amount in this case is $5,900,000. But to our mind the determination of a rate base is a broader problem, including as it does, a variety of factors that must be given consideration. We are of the opinion that there is nothing in the record to justify us in departing from our usual and well established procedure in weighing the several matters and things prescribed by our Public Service Commission law as affecting value. All of these, which are ascertainable from the record, have been set out in the foregoing findings; wherefore, after giving due consideration to all of the matters and [fol. 47] things specified by law as tending to show the value of the property used by the respondent for the public convenience, said value is found to be $3,892,000.00 as of June 30, 1922.

Order

From a consideration of the foregoing facts, the Department concludes and its order is that the value of respondent's property used for the public convenience in rendering telephone service in Spokane as of June 30, 1922, be, and the same is hereby fixed at $3,892,000. Upon this value respondent is entitled to earn a reasonable return, and said value shall hereafter, with net additions, be used as the rate base for this utility, to which may be added the value of underground plant hereafter placed in actual use, after such value exceeds the amount of $20,000 herein allowed.

Witness, The Department of Public Works of Washington this 31st of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Hance H. Cleland, Supervisor of Public Utilities. Frank R. Spinning, Supervisor of Transportation. Attest: J. H. Brown, Secretary.

[fol. 48] EXHIBIT D TO BILL OF COMPLAINT

Findings of Fact, Order, and Opinion

Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. The City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

[fol. 49] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Woman's Civic Club of

Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the state of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

[fol. 50] The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking co-operation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together [fol. 51] with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

[fol. 52] Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Fol-
[fol. 53] lowing the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

[fol. 54] In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

All the complaints were consolidated for the purpose of hearing and the hearings were joint hearings under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

[fol. 55] Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original valuation proceeding.

[fol. 56] As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity,

but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the statewide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

[fol. 57] Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington in its order in Causes 1810–1825, placing a value for rate making purposes upon the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

[fol. 58] Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account, is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, includ-

[fol. 59] ing in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

[fol. 60] Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn [fol. 61] and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construc-

tion Work in Progress" in the rate base and to include the interest accretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Depreciation

Finding

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two years from April 1st, 1923.

[fol. 62]

Discussion

One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replacements, has been $20,137,489.00, leaving a balance of $21,074,718.00, less cer-
[fol. 63] tain expenditures for extraordinary repairs and other unusual items. In other words, the replacement expenditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the State of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating this to State of Washington on the basis of plant values, the balance for Washington was $2,418,457.00. Had the company adopted a three and one-half per cent rate of depreciation at the beginning of the year 1915, and debited the depreciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits

to the depreciation reserve, for Washington, and debiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or nearly one-third of the depreciable plant value.

[fol. 64] We have found the property of respondents in the State of Washington to be about 85 per cent physical condition.

Under the view expressed by the witness referred to, the depreciation reserve should be aproximately 15 per cent of the depreciable property, where the same is found to be 85 per cent physical condition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balances, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922, B. P. 553, decided by Wisconsin Railroad Commission, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

[fol. 65] "It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one-half per cent of the depreciable property would have, so far as experience at present shows, been ample to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this discussion relates. The use of three and one-half per cent for the purpose of this case is based upon the assumption that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, durable and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any sav-
[fol. 66] ing in the way lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply

justified. In the Wisconsin case the reduction was not limited to a specified period.

Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties, under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, which would be binding upon a state regulatory body in the regulation of purely intra-state traffic, we believe that the results of this investigation will be of immense [fol. 67] value in arriving at correct methods of determining depreciation and for this reason have limited the rate herein prescribed to a two year period. The final determination of the I. C. C. should be announced within that time.

We are convinced that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to reduce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than necessary, and we are merely reducing the flow until the proper level is reached.

[fol. 68] III

The Four and One-half per Cent Contract Licensee Revenue, Dr.

Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

Discussion

This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent of substantially all of their gross operating revenue for certain rights and services. We have no power to prevent any public utility from entering into a [fol. 69] contract with a parent company to share with it any portion of its profits. We have the right, however, to say whether such share or any part thereof shall be treated as an operating expense.

Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value of the service rendered or the reasonable rental of the equipment furnished rather than upon a percentage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one-half per cent of the increase will accrue to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of ad-itional revenue, and the local company will receive no more from the parent company than it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It gives rise to suspicions of concealment and dishonesty [fol. 70] in very hearing in which it is involved. Not having power to annul it we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and Telegraph Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned and present skillful expositions of its provisions, and undertake to justify its existence, and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that establish wholesome public relation should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the Public Utilities Commission of Michigan, less than a year ago, the Commission said. "The four and one-half per cent contract between the American Telephone

[fol. 71] and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arms length but one between the superior and inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its child. The contract is in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers, because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them. Under the law of this state the four and one-half per cent contract is at least presumptively void."

[fol. 72] Substantially the same relations exist between the respondents in this case and the American Telephone and telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653.00. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allowance of something like two per cent instead of four and one-half per cent as provided [fol. 73] in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the contract is fundamentally wrong and

condemned specially by the Supreme Court of the United States. The company applies the percentage to certain gross revenues received by the appellant. The more revenues the more the charge against revenues for the benefit of the American Company, which method of calculation constitutes a circle,—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate Case (Simpson v. Chepard) 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

[fol. 74] In the case of the City of Houston v. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made as an operating expense under this contract the results would not differ materially.

The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

[fol. 75] IV

Machine Switching Project

Finding

We find that the installation of machine switching in Seattle is justified.

Discussion

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, if any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought by the installation of machine switching. In addition to the somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institution of Electrical Engineers, page 1571, where the following statement appears:

"Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence [fol. 76] today, for this movement is twenty-seven years old. Five exchanges formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expenses is as follows:

	Manual	Automatic
Total operating and maintenance expenses per year	$552,600.00	$136,800.00
Average per line per year	11.77	2.92
Average per telephone per year	8.50	2.11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation. We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result.

The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine switching devices are superior from the standpoint of economy and [fol. 77] efficiency. They are a later and somewhat costlier product, and we assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching device in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economics, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as:

[fol. 78] 1. Fluctuations in service.
2. Impairment of service by epidemics, strikes, etc.
3 The mistranslation of calling subscribers' desires.

V

Return

Finding

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

Statement of Operating Income and Rate of Return

Estimate for Year 1923

	Present rates	Proposed rates
Revenues		
1. Exchange Service Revenues	$6,642,437.00	$8,434,253.00
2. Toll Service Revenues	2,350,000.00	2,732,358.00
3. Miscl. Operating Revenues	308,004.00	308,004.00
4. Total Tel. Oper. Revenue	$9,300,441.00	$11,474,615.00
[fol. 79] **Expenses**		
5. Ordinary Repairs	$1,514,153.00	$1,514,153.00
6. Station Removals and Changes	267,385.00	267,385.00
7. Depreciation	1,070,937.00	1,070,937.00
8. Traffic Expense	2,642,731.00	2,642,731.00
9. Commercial Expense	865,011.00	865,011.00
10. General & Miscl. Expense	234,659.00	234,659.00
11. Rents	79,950.00	79,950.00
12. Uncollectible Revenues	35,618.00	48,367.00
13. Taxes	485,617.00	658,057.00
14. Licensee Revenue—Dr.	161,653.00	161,653.00
15. Total Tel. Oper. Expense	$7,357,714.00	$7,542,903.00
16. Operating Income	$1,942,727.00	$3,931,712.00
17. Int. during Constr.—Accrued	148,122.00	148,122.00
18. Adjusted Operating Income	$2,090,849.00	$4,079,834.00
19. Rate Base	$34,789,635.00	$34,789,635.00
20. Per cent Earned	6.01	11.73

NOTE.—The rate base above is the estimated average plant value for year 1923, plus working capital.

Discussion

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

Whatever saving can be made through the machine switching program, which we feel will soon be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

[fol. 80]

VI

Existing Rates

Finding

We find that the existing rates are just, fair, reasonable and sufficient.

VII

Proposed Rates

Finding

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

VIII

Decrease in Rates

Finding

The evidence does not justify any reduction in rates at this time.

IX

Reparation

Finding

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

[fol. 81]

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington, filed

with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petitions to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismissed.

Discussion

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made [fol. 82] it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope if not a promise that when conditions returned to normal and the period of inflation had passed rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now comes the respondents when we had dared hope that our predictions might be realized and ask for startling increases. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of popular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the Burleson rates and the general telephone rate level has been higher in the [fol. 83] State of Washington than in adjoining states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates.

If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in

their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

2. That the annual depreciation allowance be and the same is hereby fixed at 3½ per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and [fol. 84] Telegraph Company under said 4½ per cent contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation. Attest: J. H. Brown, Secretary.

[fol. 85] EXHIBIT E TO BILL OF COMPLAINT

Dissenting Opinion

Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works, of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rate regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

[fol. 86] BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. The City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

[fol. 87] History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Civic Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

[fol. 88] The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a consulting telephone engineer with twenty-seven years' experience in the construction, operation and engineering of independent telephone properties employed by the Department as a special engineer, were forthwith directed to proceed with and to make, in cooperation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis,

investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the mayor, council or commission and city attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations cooperate with us in this work, rendering such aid or assistance as pos-
[fol. 89] sible. These letters and complaints were mailed to the authorities of more than one hundred cities and towns.

On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently and on or about March 31, 1922, the City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case, Mr. E. D. Ridley, a well qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

Mr. Ridley and Mr. L. P. Hockett, utility engineer and account-
[fol. 90] ant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check examination and survey was made in the State of Washington, particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent telephone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules, proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint
[fol. 91] challenging the reasonableness and the legality of the proposed exchange rate schedule.

On October 5, 1922, the telephone companies filed the toll rate schedule as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequenly to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first [fol. 92] hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the re- [fol. 93] sults of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place. The greater

part of these notices were sent to business and professional men in the city of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although some 2,300 notices of hearings and personal letters were written to these [fol. 94] complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration, and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel engineers and accountants.

The investigation and hearings in this case have been the most [fol. 95] comprehensive ever made by the Public Service Commission or the Department of Public Works of Washington and have extended over a period of 14 months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of closet cooperation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents, data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane, stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Pub- [fol. 96] lic Works showed a spirit of cooperation with Spokane and Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each.)

Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Companies in the State of Washington, including the Spokane Exchange, used and useful in public service was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

[fol. 97] Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Com-

[fol. 98] pany and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in Causes 1810-1825, placing a value for rate making purposes upon

the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts [fol. 99] representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction [fol. 100] Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the company were not permitted to [fol. 101] earn on funds employed in construction work, it must be

permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant. [fol. 102] There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating income the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization [fol. 103] of interest be more, and the company if it be less, than the rate of return from operations.

II

Rate of Return—(Earnings)

Findings

That under the rates applicable during the past seven years the Pacific Telephone and Telegraph Company in the State of Washington, after paying operating expenses, taxes, licensee revenue, debtor.

and setting aside depreciation, has shown an annual rate of return as follows:

1915	1916	1917	1918	1919	1920	1921	1-1-to 6-30-22	
1.84%	3.40%	3.31%	3.13%	4.67%	4.09%	3.52%	3.35%	(annual)

and that said rate of return during the entire period has been unfair, unjust, unreasonable and less than sufficient.

That the estimated rate of return of the Pacific Telephone and Telegraph Company for the State of Washington for the year 1923 under the rate proposed by the companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

[fol. 104] That under the rates fixed and allowed by this order, the rate of return will be 7.37 per cent upon the rate base herein established.

Discussion

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximating 8% upon the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in telephone plant. As testified on cross-examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depending upon the nature or class of business in which the investment was made.

For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921, and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[fol. 105] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052.82	$8,114,245.13	$4,165,420.49
Deductions from Revenues:			
2. Telephone Operating Expenses (Excl. Dep.)	4,716,709.05	5,043,458.88	2,573,994.76
3. Taxes Assignable to Operations	600,045.53	543,449.27	262,310.90
4. Uncollectible Operating Revenues	17,321.26	29,028.68	17,061.75
5. Depreciation (on Depreciable Property)	1,177,558.87	1,321,585.78	727,295.13
6. Licensee Revenue—Dr.	327,106.58	342,658.03	173,421.04
7. Total Deductions from Revenue	$6,838,741.29	$7,280,180.64	$3,754,083.58
8. Operating Income	915,311.53	834,064.49	411,336.91
9. Interest during Construction	17,959.48	90,491.52	97,965.71
10. Adjusted Operating Income	$933,271.01	$924,556.01	$509,302.62
11. Rate Base (Incl. C. I. P.)	$22,821,159.54	$26,232,691.37	$30,425,113.89
12. Rate of Return	4.09%	3.52%	3.35%

NOTE.—Line 11—Amounts are average for the period, hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 106] 1. Telephone Operating Revenues.—This is the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The Department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reverse our former holding and practice in this regard, and to follow the law as definitely settled by the courts, which is, [fol. 107] that federal income tax is properly deductible from operating revenues.

Consolidated Gas Company of New York v. Newton, 267 Federal 231.
Newton v. Consolidated Gas Company, 42 Sup. Ct. 264.
Galveston Electric Company v. Galveston, 66 Law Ed. 382.
Reduced Rates 1922—I. C. C. 683.

4. Uncollectible Operating Revenue.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciation (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, [fol. 108] catastrophies, etc. These charges are carried to a depreciation reserve, and the costs of all replacements of plant units, instead of being included in the ordinary repairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage

necessary in the case of another exchange, due to a possible difference in the character of the physical property contained in each; yet at the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of a state, where climatic and other conditions are not the same.

The question here involved and to be determined, is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

[fol. 109] The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

Companies	5.75%
City of Seattle	5.88% (exchange plant only).
Department's Engs.	5.25%

In Case No. 4747, Public Service Commission of Washington et al. v. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the company at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Case No. 4747, depreciation percentages were allowed by us in the following cases:

Cause No. 5040, City of Port Angeles v. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club v. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

[fol. 110] Cause No. 5127, Commission v. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 commission decisions and eight court decisions.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies generally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.29% to a maximum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty cases the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 5.972%. It will also be noted that in ninety of the 112 cases reported, the depreciation allowance fell between 5% and 7%.

[fol. 111] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5.50
Arizona	PUR1920B	411	6.00
Arkansas	PUR1921B	516	6.40
California	PUR1915F	1014	5.50
California	PUR1922A	853	5.50
California	PUR1922C	97	3.28
Colorado	PUR1917B	198	5.65
Georgia	PUR1921C	833	5.11
Hawaii	PUR1921B	209	6.80
Idaho	PUR1916C	438	6.07
Idaho	PUR1920E	321	6.00
Illinois	PUR1915D	646	5.00
Illinois	PUR1916B	318	7.00
Illinois	PUR1916D	781	6.58
Illinois	PUR1917A	658	6.00
Illinois	PUR1917B	368	6.00
Illinois	PUR1918B	172	5.50
Illinois	PUR1918E	74	5.50
Illinois	PUR1915E	23	5.00
Indiana	PUR1917F	209	4.50
Indiana	PUR1918C	489	5.00
Indiana	PUR1918E	859	5.00
Indiana	PUR1918E	669	5.00
Indiana	PUR1920C	209	5.00
Indiana	PUR1920C	854	5.00
Indiana	PUR1919E	504	5.00
Indiana	PUR1920A	422	5.00
Indiana	PUR1920B	813	5.00
Indiana	PUR1920D	83	5.00
Indiana	PUR1922E	46	5.00
Kansas	PUR1915B	507	6.00
[fol. 112]			
Kansas	PUR1918C	55	6.50
Kansas	PUR1918C	777	5.72
Kansas	PUR1922A	321	4.36
Louisiana	PUR1922E	86	5.00
Maine	PUR1920C	386	3.32
Maryland	PUR1916C	925	6.25
Michigan	PUR1921C	545	5.00
Michigan	PUR1921E	308	5.00
Michigan	PUR1923A	30	4.00
Minnesota	PUR1916C	141	8.94
Minnesota	PUR1921C	733	4.50
Missouri	PUR1915C	366	6.50
Missouri	PUR1920E	59	7.00
Missouri	PUR1919A	659	5.50
Missouri	PUR1922A	773	6.00

Tabulation of Cases on Depreciation—Continued

Jurisdiction	Citation		Rate fixed
Nebraska	PUR1915E	57	6.00
Nebraska	PUR1919A	35	6.00
New Hampshire	PUR1918F	592	7.00
New York	PUR1916B	940	5.80
New York	PUR1920D	529	5.66
North Dakota	PUR1921E	567	6.00
North Dakota	PUR1922E	602	5.00
Ohio	PUR1922A	155	5.00
Oregon	PUR1915F	290	2.39
Oregon	PUR1919D	345	3.55
South Dakota	PUR1915A	562	7.00
South Dakota	PUR1915B	223	7.00
South Dakota	PUR1915E	516	6.00
South Dakota	PUT1916A	364	7.00
South Dakota	PUR1916D	603	6.00
South Dakota	PUR1919B	734	7.00
South Dakota	PUR1922D	769	4.00
Utah	PUR1918C	566	6.50
Virginia	PUR1922A	756	5.50
West Virginia	PUR1921B	97	6.10
Wisconsin	2WRCR	105	3.67
Wisconsin	2WRCR	358	8.00
Wisconsin	2WRCR	427	10.00
[fol. 113]			
Wisconsin	2WRCR	546	7.00
Wisconsin	3WRCR	117	8.00
Wisconsin	3WRCR	412	8.00
Wisconsin	3WRCR	452	8.00
Wisconsin	4WRCR	1	8.00
Wisconsin	4WRCR	259	7.50
Wisconsin	4WRCR	370	7.00
Wisconsin	4WRCR	407	7.00
Wisconsin	4WRCR	414	7.00
Wisconsin	6WRCR	211	8.00
Wisconsin	6WRCR	419	6.50
Wisconsin	6WRCR	549	6.50
Wisconsin	6WRCR	573	6.50
Wisconsin	7WRCR	428	7.00
Wisconsin	7WRCR	608	7.00
Wisconsin	8WRCR	92	6.50
Wisconsin	9WRCR	383	6.50
Wisconsin	9WRCR	489	6.07
Wisconsin	11WRCR	180	6.50
Wisconsin	11WRCR	402	7.00
Wisconsin	11WRCR	499	6.50
Wisconsin	11WRCR	666	6.52
Wisconsin	13WRCR	540	6.50

Tabulation of Cases on Depreciation—Continued

Jurisdiction	Citation		Rate fixed
Wisconsin	14WRCR	157	7.00
Wisconsin	14WRCR	594	6.50
Wisconsin	15WRCR	182	9.00
Wisconsin	15WRCR	552	7.00
Wisconsin	16WRCR	402	6.67
Wisconsin	16WRCR	473	6.50
Wisconsin	16WRCR	758	7.00
Wisconsin	PUR1916C	1020	5.00
Wisconsin	PUR1916D	631	5.50
Wisconsin	PUR1917A	439	5.17
Wisconsin	PUR1917C	507	5.50
Wisconsin	PUR1917E	540	6.00
Wisconsin	PUR1919D	909	6.00
Wisconsin	PUR1920C	1019	6.00
Wisconsin	PUR1921E	171	4.58
[fol. 114]			
Wisconsin	PUR1922A	164	6.00
Wisconsin	PUR1922B	91	5.00
Wisconsin	PUR1919F	92	5.21
Wisconsin	PUR1922B	553	3.50
Wisconsin	PUR1922D	368	5.00

The following court decisions also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.
Railroad Company v. Richmond, 96 U. S. 521.
Munn v. Illinois, 94 U. S. 133.
Cumberland Telephone and Telegraph Company v. Louisville 187 Federal 637.
Cumberland Telephone and Telegraph Company v. Memphis 183 Federal 875.
Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.
Gome Telephone and Telegraph Company v. Carthage, 139 S. W. 547.
Bell Telephone Company v. Houston, Texas, P. U. R. 192D, 793.

6. Licensee Revenue Debtor (4½% Contract).—

This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company, and the Home Telephone and Telegraph Company of Spokane, whereby [fol. 115] the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely: 1st, Subscribers' Station Revenues; 2nd, Public Pay Station Revenues; 3rd, Private

Exchange Line Revenues, and 4th, Message Toll Revenues; less Uncollectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the American Telephone and Telegraph Company supplies at all times to the Pacific Company and the Home Company certain instrumentalities, services, etc. These instrumentalties and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standarized, new and improved apparatus and methods developed through research and experimental work by the American Company.

[fol. 116] 4. A guarantee of freedom from royalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted.

6. Advice and assistance in general engineering plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plan for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters, and Induction [fol. 117] Coils).—It is conceded in this case, by all parties, that, should the only service performed by the American Company be the so-called instrument service, the annual charges therefor which might properly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four an- one-half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under contract. It is our opinion

that the value of the services rendered by the American Company exceeds the amount paid therefor, and we, accordingly, allow the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and [fol. 118] one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that four and one-half per cent of the revenues derived from increased rates is also fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and importance of the exchange increases or grows. Therefore, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of [fol. 119] exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage method of computing compensation. Eleven states, although they have allowed the full amount, have not approved the percentage method.

The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation [fol. 120] two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the

home office of the American Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before the Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al v. Pacific Telephone and Telegraph Company and the Postmaster General, and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a beneficial arrangement conducive to telephonic development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

And again in that same order, we find the following:

"Between the Bell system and its constituent companies there has for many years existed what is known as the four and one-half per cent (4½%) contract. This contract is recognized and made a [fol. 121] part of the agreement between the Bell System and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company, and Southwestern Bell Telephone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was [fol. 122] reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four

and one-half per cent contract is discussed in detail, and approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent company"—(The respondent company was in the position of the Pacific and Home companies here)—"the entire telephone experience of the world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It [fol. 123] is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the American Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.

"The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could not be obtained any other way except in a central organization. It would be impossible to render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented them to [fol. 124] the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenue.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible from revenue in computing a rate of return.

8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting Item 7 from Item 1.

9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account. It is added to Item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

10. Adjusted Operating Income.—This item is merely the sum of items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from the rate base figure in Finding I. The amounts stated herein are averages figures for the period and do not represent the rate base as of any specific date.

[fol. 125] 12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating Income by the Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

III

Hotel Rates

Finding

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding

The charges for toll messages now made by the respondent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications:

[fol. 126] 1. The classes of service at present being given to be continued.

2. The distances or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and regulations, shall be similar to the present tariff now in effect with the following exceptions:

a. The initial period for all station to station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one-third of the initial rate.

b. The initial period for all person to person, messenger and appointment intrastate messages shall be two minutes and the charge for each additional minute or fraction thereof shall be one-half of the initial rate.

c. If the initial rate for station to station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person to person, messenger or appointment calls is not evenly divisible by two, the charge for each addi-
[fol. 127] tional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion

As stated in our order suspending the company's proposed rates we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

a. From facts thus far developed the Department is inclined to the view that property used and useful devoted to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

[fol. 128] The changes above directed in the toll schedule will accomplish the result contemplated by the Department in its suspension order.

V

Exchange Rates

Finding

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, unfair, unreasonable and more than sufficient. The exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair, reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year [fol. 129] of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the estimated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

Rates

Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c. per month additional.

[fol. 130] Rates

Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	*	$.05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

Rates

Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

*25c per month additional.

[fol. 131] Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-Public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	*	$.05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

Hotel Private Branch Exchange Service Rates

Seattle, Tacoma, and Spokane Exchanges

Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type:	
10 lines or less in use	5.00
11– 30 lines in use	6.00
31– 60 lines in use	7.00
61–100 lines in use	8.00
101–150 lines in use	9.00
151–200 lines in use	10.00
201–260 lines in use	11.00
261–320 lines in use	13.00

* 25c per month additional.

[fol. 132]

Multiple Cord Type:

Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Seattle	Tacoma	Spokane
Each station not in guest room, without dial—			
Wall set	$1.25	$0.95	$1.00
Desk set	1.50	1.20	1.25
Each station not in guest room, with dial—			
Wall set	1.50	1.15	1.20
Desk set	1.75	1.40	1.45
Each station in guest room, without dial—			
Wall set	.75	.55	.60
Desk set	1.00	.80	.85
Each station in guest room, with dial—			
Wall set	1.00	.75	.80
Desk set	1.25	1.00	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk Lines to central office from switchboard or order boards—

Each bothway trunk line—Individual Line business rate plus	$3.00
Each incoming trunk line	Individual Line business rate

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 133] Statement of Operating Income and Rate of Return

Estimate for the Year 1923

	Present rates	Company proposed rates	Department allowed rates
1. Operating Revenues	$9,300,441.00	$11,474,615.00	$10,751,350.00
Deductions from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889.00	5,603,889.00	5,603,889.00
3. Taxes Assignable to Operations	581,000.00	658,057.00	637,413.00
4. Uncollectible Revenues	35,618.00	48,367.00	44,445.00
5. Depreciation (on Depreciable Property)	1,674,024.00	1,674,024.00	1,674,024.00
6. Licensee Revenue—Dr.	386,170.00	386,170.00	386,170.00
7. Total Deductions from Revenues	$8,280,701.00	$8,370,507.00	$8,345,941.00
8. Operating Income	$1,019,740.00	$3,104,108.00	$2,405,409.00
9. Interest during Construction	148,122.00	148,122.00	148,122.00
10. Adjusted Operating Income	$1,167,862.00	$3,252,230.00	$2,553,531.00
11. Rate Base (including Const. Work in Progress)	$34,789,635.00	$34,789,635.00	$34,789,635.00
12. Rate of Return	3.36%	9.35%	7.34%

[fol. 134] Farmer Line Rates

Finding No. VI

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standardize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the Number of exchange station is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.50
Under 500	3.00

Reparation

Finding No. VII

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general [fol. 135] reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

Discussion

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegrapl. Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hear- [fol. 136] ings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Wash-

ington, filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the foregoing statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue, the same is hereby dismissed.

[fol. 137] Order

It is hereby ordered:

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with the findings of fact and directions herein contained; and that all rates, rules and regulations as amended or supplemented as herein found and ordered be, and they are hereby made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, By —— ——, Director. Hance H. Cleland, Supervisor of Public Utilities. —— ——, Supervisor of Transportation. Attest: —— ——, Secretary.

[fol. 138] EXHIBIT "F" TO BILL OF COMPLAINT

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Washington, set out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities, State of Washington, in Case Numbers 4902 and 5344

Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	..	..

[fol. 139] Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	*	$.05

	Rate per month	
	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c. per month additional.

Hotel Private Branch Exchange Service Rates

Spokane Exchange

Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type:	
10 lines or less in use	5.00
11-30 lines in use	6.00
31-60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Spokane
[fol. 140] Each station not in guest room, without dial—	
Wall Set	$1.00
Desk Set	1.25
Each station not in guest room, with dial—	
Wall Set	1.20
Desk Set	1.45
Each station in guest room, without dial—	
Wall Set	.60
Desk Set	.85
Each station in guest room, with dial—	
Wall Set	.80
Desk Set	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk lines to central office from switchboard or order boards—	
Each bothway trunk line.—Individual Line business rate plus	$3.00
Each incoming trunk line	Individual Line business rate.

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[File endorsement omitted.]

[fol. 141] UNITED STATES OF AMERICA:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. IN EQUITY

No. 167-E

SUBPŒNA AND RETURN—Filed April 26, 1923

The President of the United States of America to E. V. Kuykendall, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants, Greeting:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Tacoma, Washington, on the 14th day of May, 1923, to answer a Bill of Complaint filed against you in said Court by The Home Telephone and Telegraph Company of Spokane, a Corporation, Plaintiff, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 24th day of April, 1923.

F. M. Harshberger, Clerk, By Alice Huggins, Deputy Clerk.
(Seal U. S. Court.)

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. Harshberger, Clerk, By Alice Huggins, Deputy Clerk.
(Seal U. S. Court.)

UNITED STATES OF AMERICA,
Western District of Washington, ss:

Marshal's Return

I hereby certify, that I have served the within writ by delivering to and leaving a true copy thereof with Hance H. Cleland, Supervisor of public utilities of Washington, Frank R. Spinning, as Supervisor of Transportation of Washington, and John H. Dunbarr, Attorney General of Washington, at Olympia, Washington.

E. B. Benn, United States Marshal. By John T. Secrist, Deputy. April 25, 1923. Fees: $10.67.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Western District of Washington, ss:

Return on Service of Writ

I hereby certify and return that I served the annexed Subpœna in Equity on the therein-named E. V. Kuykendall, as Director of Public Works of Washington by handing to and leaving a true and correct copy thereof with Frank R. Spinning, Supervisor of Transportation of Washington, at his usual place of business personally at Olympia, Washington, in said District on the 25th day of April, A. D., 1923.

E. B. Benn, U. S. Marshal, By John T. Secrist, Deputy.

[fol. 142] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

RESTRAINING ORDER—Filed Apr. 24, 1923

This matter coming on for hearing before the Honorable Edward E. Cushman, Judge of the above named court on the motion of the above named plaintiff for a temporary restraining order, restraining the defendants, and each of them, and all other persons from attempting to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and

filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents, or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, [fol. 143] agents or employees, for disregarding the rates and charges set forth in said schedule "Exhibit A," or from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F" and that an order to show cause herein, upon the application of the plaintiff herein, directed to the above named defendants, and each of them, requiring them, and each of them, to show cause why a temporary injunction should not issue as prayed for in the bill of complaint heretofore filed herein, and it being necessary that notice of said application for said temporary injunction be given before said application shall be heard and determined to not only all of the defendants named herein, but to the Governor of the State of Washington as well;

It is, therefore, ordered that the defendants, and each of them, be and appear before the above named court in the District Court of the United States in and for the Western District of Washington, Southern Division, sitting at Tacoma in said District, on the 30th day of April, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as a court constituted as provided by Section 266 of the Judicial Code of the United States can be convened, then and there to show cause, if any they have, why they, and each of them, should not be enjoined and restrained in the manner hereinbefore stated.

It further appearing to the court that immediate and irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted, it is ordered that until a hearing of this show cause order and determination thereof, the defendants, and each of them, and all other persons, are restrained from attempting to compel the plaintiff, its officers, agents and employees, to observe [fol. 144] maintain and keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents, or employees from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents, or employees for disregarding the rates and charges set forth in said schedule "Exhibit A" and from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F."

And it is further ordered by the court that a copy of this order be served at least five (5) days before said 30th day of April, 1923, upon each and every of the defendants above named, including the Attorney General, and also upon the Governor of the State of Washington.

And it is further ordered that this order shall become effective upon the plaintiff company giving a bond in the sum of $50,000.00

to be approved by the court, conditioned to reimburse subscribers the excess over the rates set forth in "Exhibit A" in case it is finally determined that the increase in rates hereby authorized ought not to have been authorized; and it is further ordered that until the further order of this court, the plaintiff company shall keep its accounts in such a way that said excess due to the rates made effective by this order and paid by each subscriber, can be readily and ac-
[fol. 145] curately ascertained.

And it is further ordered that the plaintiff shall file with the Clerk of the above named court, conveniently after the first day of each month, a statement of the amount collected from each of its subscribers, together with a statement of the amount that would have been collected had the rates set forth in "Exhibit A" been in force, and that when a final decree is entered, if it shall be determined that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, then and in that event the difference between the rates set forth in "Exhibit A" and the rates collected, shall be paid to a special master, to be appointed by this court, and by the special master distributed to the various persons entitled to receive the same; and that in the event that a final decree is entered, adjudicating that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, and the plaintiff should fail to pay to the special master the difference between the rates set forth in "Exhibit A" and the rates collected, then the special master, appointed by this court, may institute suit on the bond in behalf of all the subscribers, to recover the amounts to which they, respectively, may be entitled.

Done in open court this 24th day of April, 1923.

(Sgd.) Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 146] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of C. T. Blanck as to Cost of Construction of Property—Filed Apr. 24, 1923

State of California,
City and County of San Francisco, ss:

C. T. Blanck, being first duly sworn, deposes and says: That he resides in the City of Berkeley, State of California; that he is thirty-six (36) years of age, and, in the year 1902 was first employed in telephone engineering, construction and maintenance work by The
[fol. 147] Pacific Telephone and Telegraph Company, its predecessors and associated companies, (one of which is plaintiff company) and was continuously employed by the Pacific Company

until the end of the year 1917, when he entered the United States Army as a commissioned officer in the Signal Corps and upon his return from France upon completion of his military service, late in the year 1919, re-entered the employ of The Pacific Telephone and Telegraph Company, and associated companies, (one of which is plaintiff company) and he has since been employed continuously by said company in general engineering and appraisal work.

That he is thoroughly familiar with telephone properties and with the work, labor and materials entering into the construction of same and with the units of cost thereof, and in the regular course of his employment he has engaged in making appraisals of telephone properties situated in the States of Washington, Idaho, Oregon, California and Nevada and in France, the aggregate value of which runs into more than one hundred millions of dollars, and during the last sixteen or seventeen years, he has given particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

[fol. 148] That he is thoroughly familiar with the entire property belonging to plaintiff company in the City of Spokane and in the territory adjacent thereto, all in the State of Washington, and devoted by it to the furnishing of telephone service in said city and territory in said State.

That for several months he has been employed with a relatively large force under his direction in making an exhaustive inventory and appraisal of said property and, in the course of such employment, has determined the cost of constructing said property.

That in arriving at the cost of constructing said property he has taken into consideration, among other things, the following facts and matters:

(a) The exhaustive inventory of said property as of June 30, 1922. This inventory was subdivided by accounts in accordance with the system of accounting used by this Company, which is that prescribed by the Interstate Commerce Commission in its circular entitled "Uniform System of Accounts for Telephone Companies," and which is adopted by the Department of Public Works of the State of Washington.

[fol. 149] The work of compiling the inventory was divided into two distinct parts:

1. Collecting the field data.

2. Tabulating and verifying the field data collected.

The field inventory notes were taken during the month of August, at which time of the year the work of the Maintenance force of the Company is at a minimum. In view of this condition, it was deemed advisable to use the services of Maintenance employees and thereby obtain a force which was thoroughly conversant with all the property of the Company. Men who were thoroughly familiar with the items of property to be inventoried were picked from the local organization to do the field work. For example, men whose daily duties were the maintenance of pole line and aerial wire were

assigned the task of securing what was known as the "Pole Line and Wire" data, and the men selected for securing the data on aerial cable were those who had formerly acted in the capacity of foreman in charge of aerial cable construction. Similarly, all other classes of plant information were secured by men who were engaged in the maintaining of plant which they inventoried. The field notes [fol. 150] were tabulated by experienced and qualified office men who were thoroughly familiar with reading and tabulating field notes. Exhaustive checks were made during the course of the work to assure the accuracy of the inventory.

The engineers of the Department of Public Works made an exhaustive field and office check of this inventory and it was found by them to be substantially correct in all its details. This inventory was presented in formal hearing before the Public Service Commission of the State of Washington on December 19, 1922, in Case, Cause No. 5344, before said Department, and identified in the records of that case as "Company Exhibit No. 1, Blanck 1."

(b) The exhaustive appraisal of said property as of June 30, 1922. This appraisal was made on the basis of actual performance applied to the items of property as inventoried, with the exception of the item "Land," which was included therein at the then market value, determined by a disinterested appraiser familiar with real estate valuation in the various localities in which the parcels of lands were located. This actual performance basis was determined from the costs as shown by the official records of the Company, which were [fol. 151] and are kept in accordance with the system of accounting for telephone companies, prescribed by the Interstate Commerce Commission in its Circular entitled "Uniform System of Accounts for Telephone Companies" and which system was adopted by the Public Service Commission, now the Department of Public Works of the State of Washington.

In determining the actual performance costs, all available records of the cost of building this property were gone over in detail and carefully analyzed.

This appraisal was exhaustively checked by engineers of the Department of Public Works and was found by them to be substantially correct in all its details. This appraisal was presented in formal hearing before the Department of Public Works of the State of Washington on December 19, 1922, in Case, Cause No. 5344, before said Department, and identified in the records of that case as "Company Exhibit No. 3, Blanck 3."

(c) The additions and betterments to said property during the period June 30, 1922, to December 31, 1922. The additions and betterments, or "Net Additions," are taken from the official records of the Company and represent the literal facts taken from the reports of actual daily operations in accordance with the principles [fol. 152] established in the accounting methods prescribed by the Interstate Commerce Commission and the Public Service Commission, now the Department of Public Works of the State of Washington.

(d) The amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets as of December 31, 1922, being the sum of $3,762,955.00.

That adding the additions and betterments to the actual performance appraisal as of June 30, 1922, the cost of the property of plaintiff used and useful in rendering telephone service in the City of Spokane and territory adjacent thereto, all in the State of Washington, as of December 31, 1922, was the sum of $4,266,899, including therein the sum of $68,947 for the Working Capital and Materials and Supplies.

That the cost of property of plaintiff so found herein is substantially the same as the value for rate making purposes fixed by the Department of Public Works in their Findings of Fact, Order and Opinion in Case, Cause No. 5344, as of June 30, 1922, plus actual additions and betterments to December 31, 1822.

[fol. 153] That the cost of the property of plaintiff so found herein is more than the amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets, primarily for the reason that plaintiff's capital accounts are characterized by certain erroneous entries having their origin in a misinterpretation of certain Interstate Commerce Commission accounting rules which have persisted pending approval of their correction by the Interstate Commerce Commission.

C. T. Blanck.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[File endorsement omitted.]

[fol. 154] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. S. CASASSA—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Casassa, being duly sworn, deposes and says: That he resides in San Francisco, California. That he was first employed in the telephone business in 1897 by the predecessor of The Pacific Telephone and Telegraph Company in the Accounting Department, and has ever since been and is now in the employ of said company in its Accounting Department. That since April, 1912, he has held the position [fol. 155] of Auditor of Disbursements, and since July, 1922, in the absence, on account of illness, of the General Auditor, has been Acting

General Auditor of said company, and as such has had complete charge of all its accounts and accounting systems, and is thoroughly familiar with the same. That The Home Telephone and Telegraph Company of Spokane is one of the companies in the Pacific System, and the affairs of that company are within the knowledge and control of affiant to the same extent as those of the Pacific Company.

That the accounts of the plaintiff are and have been since January 1, 1913, kept in accordance with accounting regulations prescribed by the Interstate Commerce Commission and adopted by the Public Service Commission of Washington, now the Department of Public Works of Washington.

That the statements as to costs hereinafter set out contain nothing on account of franchises or on account of the item known as going concern value.

1919

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1919 [fol. 156] amounted to 2.95 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1919 is as follows:

Average Cost of Property

Average Plant and Equipment	$3,725,767
Average Working Assets	97,695
Total	$3,823,462

Telephone Revenues

Exchange Service	$841,377
Toll Service	65,021
Miscellaneous	25,634
Total Telephone Revenues	$932,032

Telephone Expenses

Current Maintenance	$103,539
Depreciation and Amortization	169,978
Traffic	359,536
Commercial	79,027
General and Miscellaneous	19,267
Uncollectible Operating Revenues	4,000
Taxes	43,652
Rent Deductions	1,422
Licensee Contract Expense	38,776
Total Telephone Expenses	$819,197
Net Telephone Revenue	112,835
Per Cent Net Revenue	2.95%

[fol. 157] 1920

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1920 amounted to 1.79 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1920 is as follows:

Average Cost of Property

Average Plant and Equipment	$3,751,075
Average Working Assets	79,597
Total	$3,830,672

Telephone Revenues

Exchange Service	$981,520
Toll Service	81,047
Miscellaneous	35,507
Total Telephone Revenues	$1,098,074

Telephone Expenses

Current Maintenance	$175,627
Depreciation and Amortization	172,835
Traffic	439,783
Commercial	91,342
General and Miscellaneous	24,598
Uncollectible Operating Revenues	1,800
Taxes	75,235
[fol. 158] Rent Deductions	1,438
Licensee Contract Expense	46,845
Total Telephone Expenses	1,029,503
Net Telephone Revenue	68,571
Per cent Net Revenue	1.79%

1921

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1921 amounted to 2.35 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operation for 1921 is as follows:

Average Cost of Property

Average Plant and Equipment	$3,810,406
Average Working Assets	80,179
Total	$3,890,585

Telephone Revenues

Exchange Service	$1,054,760
Toll Service	82,814
Miscellaneous	43,350
Total Telephone Revenues	$1,180,924

[fol. 159] Telephone Expenses

Current Maintenance	$211,596
Depreciation and Amortization	179,110
Traffic	436,500
Commercial	103,221
General and Miscellaneous	28,813
Uncollectible Operating Revenues	1,100
Taxes	75,929
Rent Deductions	2,540
Licensee Contract Expense	50,652
Total Telephone Expenses	$1,089,461
Net Telephone Revenue	91,463
Per Cent Net Revenue	2.35%

1922

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1922 amounted to 3.07 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said cost and the results of said operations for 1922 is as follows:

Average Cost of Property

Average Plant and Equipment	$4,044,954
Average Working Assets	68,947
Total	$4,113,901

[fol. 160] Telephone Revenues

Exchange Service	$1,091,268
Toll Service	85,514
Miscellaneous	49,441
Total Telephone Revenues	$1,226,223

Telephone Expenses

Current Maintenance	$192,258
Depreciation and Amortization	192,040
Traffic	450,672
Commercial	112,954
General and Miscellaneous	37,554
Uncollectible Operating Revenues	4,900
Taxes	54,615
Rent Deductions	2,406
Licensee Contract Expense	52,367
Total Telephone Expenses	$1,099,766
Net Telephone Revenue	126,457
Per Cent Net Revenue	3.07%

That the amounts by which the net telephone revenues derived by the company from its telephone business fall short of a return of 8 per cent upon said cost of the property used or useful in and devoted to the rendition of said telephone business are as stated below for the respective periods indicated:

Year 1919	$193,042
Year 1920	237,883
Year 1921	219,784
Year 1922	202,655

C. S. Casassa.

[fol. 161] Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 162] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of C. E. Fleager—Filed April 24, 1923

State of California,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I reside in Berkeley, California, and am forty-three years of age; I have been employed in the telephone business for twenty-three years

by The Pacific Telephone and Telegraph Company, its predecessors and associated companies (one of which is the plaintiff company) for twenty-one years; I am Assistance Vice President of the Pacific Com- [fol. 163] pany and during my experience with said company have had responsible charge of general engineering matters running to the design and construction of toll and exchange lines, fundamental engineering plans, inventory and appraisal work and similar general engineering matters; I am familiar with telephone properties and with the work labor and material entering into the construction of the same and with the units of cost thereof and in the regular course of my employment I have engaged at different times in making appraisals of telephone property situated in the states of Idaho, Washington, Oregon, California and Nevada, the aggregate values of such run over one hundred millions of dollars, and during the last nine years I have been giving particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

I am thoroughly familiar with the entire property belonging to the plaintiff company and devoted by it to the furnishing of telephone service in said state and for some years past have had responsible charge of inventory and appraisal work in connection with that property; that for several months I have been employed with a force [fol. 164] under my direction in making an appraisal of said property and in the course of such employment I have made a valuation as of the present time, of all of the property used or useful by the plaintiff company in the rendition of its telephone service.

In arriving at the present fair value of the property of plaintiff hereinafter stated I have taken into consideration among other things, the following facts and matters:

(a) The cost of construction of said property as evidenced by the affidavit of C. T. Blanck, filed herein, is the sum of $4,266,899, as of December 31, 1922, and the fact that said cost includes the cost of a large amount of property, approximately fifty per cent of the total, which was constructed prior to the year 1915, before the increases in labor and material costs due to conditions prevailing during and since the World War became operative.

(b) The amount on the books for said property being the sum of $3,726,955, as of December 31, 1922.

(c) The cost of reproduction new of said property. By using the actual units of property making up the said plant used or useful and devoted exclusively to the rendition of telephone service by the plain- [fol. 165] tiff and applying thereto prices of labor and material proper as of this time, I have determined the cost of reproduction of said property to be, as of December 31, 1922, the sum of $8,039,784. This value includes a reasonable allowance for working capital, materials and supplies and for the item usually called going concern value. In ascertaining the cost of reproduction new, above stated, I have used prices which I regard as applicable and which are considerably lower than the price prevailing during and since the World

War. Had I used the peak prices prevailing during and since the World War the cost of reproduction new of said property would have been a sum in excess of $19,400,000.

(d) Said telephone property of the plaintiff is and has been, at all times of my employment with the plaintiff company, in a 100 per cent service condition and I have, from time to time, observed and caused to be observed, inspected and examined said property and parts thereof and, in a general way, am familiar personally with the present condition of said property. I have taken into consideration, in arriving at the present fair value of said property, such depreciation in the property as actually exists and have determined that the [fol. 166] cost of reproduction of said property less depreciation as of the 31st day of December, 1922, is the sum of $7,382,484.

(e) Appraisals made of the land owned by the plaintiff, as determined from time to time by disinterested appraisers familiar with real estate values in the various localities in which said parcels of land are located.

(f) Based upon my experience in examining and appraising the properties and operations of the plaintiff company and my knowledge of plaintiff's actual requirements over several years for working capital and materials and supplies necessary in the rendition of telephone service, I have estimated the amount reasonably required by plaintiff for such purpose at not less than $68,947.

After giving careful consideration to all of plaintiff's property, its history, location and character, and to the factor usually called going concern value, and all facts and matters above enumerated and all other facts within my knowledge affecting its value, it is my opinion that the present fair value of the entire Property of the plaintiff used or useful and devoted by it to furnishing telephone service as of [fol. 167] December 31, 1922, is in excess of the sum of $5,710,684.

I further say that in arriving at such present fair value I have made no allowance for the value of any of plaintiff's franchises or rights to own or operate a telephone system in the State of Washington or any of its municipalities.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 168] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF J. C. NOWELL—Filed April 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. C. Nowell, being first duly sworn, deposes and says that he is the Vice President of plaintiff, The Home Telephone and Telegraph Company of Spokane, and resides at Hillsborough, California.

That plaintiff had on December 31, 1922, six central offices in the Spokane Exchange and upwards of 31,700 subscribers therein. That the number of stations, as they are commonly referred to, [fol. 169] operated by plaintiff is growing continually, and the estimated growth in the number of stations during the year 1923 in Spokane Exchange, will be approximately 2,100 stations. That plaintiff has more than 22,000 subscribers' accounts for its Spokane Exchange.

That the plant and property of plaintiff are at all times kept in first class condition by making necessary repairs and renewals so that from an operating and service standpoint, all of the plant and property in its entire system are kept in a high state of operating effciency.

That the business of plaintiff requires large amounts of new capital continually because of the continual growth of business and because of its character; that as new subscribers or users of the service are added to the system, it is necessary to install new telephones, equipment and wires running from the place where the telephone station is located to the central office from which the telephones are served. That as the capacity of the switchboards of plaintiff *are filed* up, the installation of additional switchboards, apparatus and equipment, the rearrangement of central offices, the acquisition of additional real estate and the construction of new [fol. 170] buildings are required, the total cost of which runs into great sums of money. That the actual net expenditures made by plaintiff for additional property and construction during the years 1921 and 1922 in the Spokane Exchange, were as follows:

Year 1921	Year 1922
$163,099.00	$305,996.00

That the following amounts are planned to be expended by plaintiff for additional property and construction for the Spokane Exchange during the years 1923 and 1924:

Year 1923	Year 1924
$300,000.00	$600,000.00

That one of Affiant's chief duties has been to supervise and examine into the operating expenses of plaintiff, and he has made every effort to effect as many economies as possible to keep the operating expenses at as low a level as is consistent with the maintenance of the plant and the furnishing of good service. That in the opinion of Affiant the operating expenses of plaintiff at the present time are, and during the past have been, fair and reasonable.

That the majority order of the Department of Public Works [fol. 171] made on March 31, 1923, deals with all of the property in the State of Washington owned by both The Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane, plaintiff, as one. That said Department estimates the return which will be realized upon said combined properties under the present rates at 6.01%. That said return would not, however, be realized, because of mathematical errors made by the Department in its calculations, which would reduce the net return, and by its failure, after acknowledging the correctness of deducting income taxes as an expense, to make that deduction in arriving at its net return. Taking the property of plaintiff, however, and using the value for rate making purposes found by said Department, and figuring the expenses on the erroneous basis used by said Department in arriving at its return of 6.01% for the state as a whole, would give a return on the property of plaintiff of only 4.80% instead of 6.01%.

That Affiant is familiar with the contract between The Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company, referred to in the order of the Department of March 31, 1923, as the 4½% contract which contract under the [fol. 172] contract existing between The Pacific Telephone and Telegraph Company and plaintiff, is made applicable in all respects to plaintiff to the same extent as to said Pacific company. That Affiant is familiar with the services rendered by said American company to plaintiff under said contract. That the telephone service rendered by plaintiff at this time could not be rendered without the facilities and services so furnished by the American company. That such services and equipment are not available to plaintiff from any other source; that in consequence, the payment by plaintiff of the sum of $52,367.00 for the year 1922 made in payment of such services, and the corresponding amount due and payable from the revenue of 1923, were and are inescapable; that said services and the equipment furnished in conjunction therewith are and will be worth to plaintiff in excess of the amount paid and payable under said contract; that said services can not be secured for the payment of $29,500.00 the amount arbitrarily set up by the Department for the year 1923, and that the return of 4.80% disclosed by the Department's findings would for this reason alone be reduced by the difference between said amount and the amount payable under said contract, and that this difference for the year 1923 is more than the [fol. 173] sum of $25,500.00. That in addition the expense for depreciation to be met by plaintiff from its revenues from its system in the Spokane Exchange will be upwards of $61,000.00 in

excess of the amount figured by the Department. That with the 4½% payment and the expense for depreciation herein set forth, the rates fixed in the majority order of the Department will give a rate of return to plaintiff from its operations in the Spokane Exchange of not more than 2.72% on the value for rate making purposes fixed by the Department, and of not more than 1.96% on the fair value of plaintiff's property in the Spokane Exchange.

J. C. Nowell.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 174] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That the property used by the plaintiff in the rendition of its service is classified under the system of accounts prescribed by the Interstate Commerce Commission, the so-called depreciable property [fol. 175] being shown under the following items, with the account numbers as indicated:

212. Buildings.
221. Central Office Telephone Equipment.
222. Other Equipment of Central Offices.
231. Station Apparatus.
232. Station Installations.
233. Interior Block Wires.
234. Private Branch Exchanges.
235. Booths and Special Fittings.
241. Exchange Pole Lines.
242. Exchange Aerial Cable.
243. Exchange Aerial Wire.
244. Exchange Underground Conduits.
245. Exchange Underground Cable.
246. Exchange Submarine Cable.
251. Toll Pole Lines.

252. Toll Aerial Cable.
253. Toll Aerial Wire.
254. Toll Underground Conduit.
255. Toll Underground Cable.
256. Toll Submarine Cable.
261. Office Furniture and Fixtures.
262. General Shop Equipment.
263. General Store Equipment.
264. General Stable and Garage Equipment.
265. General Tools and Implements.

That, in the rendition of its service, the plaintiff uses up the property of the classes indicated in the foregoing classification. [fol. 176] For instance, a switchboard, which under the above classification, would come under the head of central office equipment, Account No. 221, will have a certain useful life in the rendition of the company's service, at the expiration of which it will be discarded.

Among the causes which end the useful life of any piece of depreciable property are natural wear and tear, obsolescence, the fact that it becomes inadequate for the service required of it, public requirements, that is, requirements of public authorities that render necessary changes in plant, storms, fires and other casualties.

When property is discarded, usually more or less salvage is realized from it. Under the said accounting rules and practices the term "net salvage" means the net amount realized from the discarded property; that is, the amount realized from it, less the cost of removing and disposing of it. The amount of this net salvage will obviously vary radically with the different classes of property. For instance, if it were necessary to take down an old pole line, probably the cost of taking the pole line down would amount to more than the poles could be sold for so that here the net salvage [fol. 177] would be a minus amount. On the other hand, in the case of the switchboard, the net salvage would be a substantial amount, although the fact that the relatively large item of labor incidental to its original installation would be entirely lost, would tend to minimize such net salvage.

The cost of depreciable property used up in the rendition of the plaintiff's exchange service, less the net salvage recovered on account of this property when it is discarded, is a part of what it has cost the plaintiff to render this service during the term of the useful life of the property in question.

Under the said accounting rules and practices and under the accounting rules of the Department of Public Works of Washington, the plaintiff is required to charge this cost of expense to its operating expenses, except certain minor items charged initially to certain clearing accounts, in equal periodical increments during the useful life of the property, and this is done month by month. At the time that this charge is made to operating expenses a corresponding credit is made to the account entitled "Reserve for Accrued Depreciation."

When a piece of property is discarded, this account "Reserve

[fol. 178] for Accrued Depreciation" is charged with the difference between the cost of this property and the net salvage recovered from it. At the same time the proper fixed capital account is reduced by the amount of the original cost of the property in question.

The cost of rendering plaintiff's service is treated in the accounts in the same manner in which other cost items extending over a considerable period are treated. In the cases of taxes covering a year or interest covering a fixed period, or expenses of financing and bond discounts covering a number of years, the total expense is ascertained and is then charged to the operating expenses and credited to the account entitled "166—Taxes Accrued," or "167—Accrued Liabilities Not Due," as the case may be, against which account the payment when made is charged in a lump. In none of these cases is any specific reserve actually set aside.

While the depreciation account is entitled "Reserve for Accrued Depreciation," no reserve in the sense of a fund set aside for this specific purpose is maintained. The moneys taken out of earnings and represented by these charges to operating expenses and credits to this account go into the general funds of the plaintiff and find their way into property and plant owned by it so that as parts [fol. 179] of its investment are retired, they are replaced by other investments in a like amount and its capital is maintained unimpaired.

The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account "Reserve for Accrued Depreciation" are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance. The original cost is readily and definitely ascertainable. What will be the useful life of any piece of telephone property and what will be the net salvage recovered upon the termination of this life, are factors looking to the future which must necessarily be based upon estimates founded upon the judgment of those educated in the business applied to the recorded experi-nce of the company over a long series of years.

While the exact time when any specific piece of property will go out of use may not be accurately determinable, the average useful lives of the various classes of property are factors which may be fixed with substantial accuracy and this is true also as to the de- [fol. 180] termination of the net salvage. These determinations should be reviewed from time to time and where there are changes in conditions or in the character of the plant which appear to be more than temporary so as to affect substantially these averages, corresponding adjustments should be made.

During the last six years, it has been part of my duty to study continuously the facts bearing upon these factors of useful life and net salvage, for use as a basis for revision of charges to operating expenses and credits to accounts "Reserve for Accrued Depreciation" when changed conditions made the same proper. The last such revision made effective the 1st day of August, 1919, produced a re-

duction in the composite rate previously in effect and applied to present depreciable property from 6.19% to 5.78%.

That in the contract made between the Postmaster General and the plaintiff in connection with the federal possession, control and operation of the plaintiff's property during the year August, 1918, to August, 1919, the comparable composite rate for the charges to operating expenses and clearing accounts and credits to the account "Reserve for Accrued Depreciation" was fixed at 5.72%, except [fol. 181] that the item of Right of Way, Account No. 207, was not included in this composite rate but was carried separately with a depreciation rate of 2.55 per cent. This item is small and would not materially affect the said figure of 5.72 per cent. This composite figure was applied to plaintiff's total depreciable property during the year of federal operation.

That upon the termination of federal operation on August 1, 1919, plaintiff put into effect the rates of depreciation shown below and these rates have been continued in effect up to this time:

Depreciation Rates in Effect Since August 1, 1919

212. Buildings	3.0
Cable, Aerial:	
242. Exchange	5.4
252. Toll	5.0
Cable, Underground:	
245. Exchange	3.0
255. Toll	2.8
Cable, Submarine:	
246. Exchange	8.0
256. Toll	8.0
221. Central Office Equipment	8.0
222. Other Equipment of C. O.	8.0
[fol. 182] Conduit, Underground:	
244. Exchange	2.7
254. Toll	2.0
261. Office Furniture and Fixtures	10.0
Pole Lines:	
241. Exchange	10.0
251. Toll	6.1
207. Right of Way—	
Exchange	2.55
Toll	2.55

Station Equipment:

231. Station Apparatus	8.0
232. Station Installations	...
233. Interior Block Wires	...
234. Private Branch Exchanges	8.0
235. Booths & Spl. Fittings	8.0
262. General Shop Equipment	10.0
264. General Stable and Garage Equipment	20.0
263. General Store Equipment	10.0
265. General Tools & Implements	20.0

Wire, Aerial:

243. Exchange	10.0
253. Toll	3.8

That the composite rate resulting from the application of the above specific rates to the depreciable property was 5.63% for the year 1920, 5.73% for the year 1921 and 5.81% for the year 1922. [fol. 183] That under the regulations of the Interstate Commerce plaintiff is required to file an annual report as of December 31st, showing, among other things, the composite rate of depreciation charged during the year. Plaintiff has so filed the composite rate so charged for each year.

That the amendment to Paragraph 5 of Section 20 of the Interstate Commerce Act, made by Section 435 of the Transportation Act, 1920, became effective on February 28, 1920, and that in the exercise of the authority vested in the Interstate Commerce Commission by said amendment to the Interstate Commerce Commission Act, on March 18, 1920, it issued the following order:

"Interstate Commerce Commission, Washington

"March 18, 1920.

"To all carriers concerned:

"Section 435 of the Transportation Act, 1920, contains the following provision:

" 'The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with re- [fol. 184] spect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes of property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall

in any case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.'

"Information received by the Commission indicates the existence of doubt as to the propriety of carriers making any charges to operating expenses with respect to depreciation prior to such time as the Commission shall prescribe the specific percentages of depreciation which shall be charged.

"The purpose of this circular is to dispel any such doubt as may exist in the minds of accounting officers.

"Until the Commission shall otherwise order, all carriers subject to the Act to regulate commerce should continue to observe the requir-ments respecting the accounting for depreciation which are embodied in the effective accounting classifications prescribed by the Commission for the respective classes of carriers.

"George M. McGinty, Secretary."

[fol. 185] That in order to carry out the provisions of said Section 20, as amended, the Interstate Commerce Commission organized a subdivision of its bureau of accounts, which is designated as the depreciation section, with Mr. Frank S. Fowler as chief for the purpose of aiding the commission in carrying out the provisions of said section as amended.

That for over a year last past, the said depreciation section has been conducting an investigation of the subject, preliminary to public hearings, which the Commission has indicated its purpose to hold with reference to this matter. In connection with this investigation Mr. Charles A. Heiss, Comptroller of the American Telephone and Telegraph Company, has been authorized to represent the Bell System companies, including the plaintiff, before the depreciation section.

That on January 6, 1921, the said Mr. Fowler addressed to the said Mr. Heiss a letter, copy of which follows:

[fol. 186] "Interstate Commerce Commission, Bureau of Accounts, Washington

"January 6, 1921.

"Mr. Charles A. Heiss, Comptroller American Telephone & Telegraph Co., 195 Broadway, New York, New York.

"Dear Sir: Section 20 of the Interstate Commerce Act, as amended February 28, 1920, requires the Interstate Commerce Commission to prescribe for carriers subject to the Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property.

"For the purpose of carrying out these requirements a preliminary investigation of the depreciation question is being conducted to secure all information possible to formulate recommendations which

will be made public and fully considered at public hearings before the Commission takes the final steps required by the Act.

"In view of the magnitude of this subject and its paramount importance it is desired that all interested persons be given an opportunity to present their views and you are therefore requested to submit, with as little delay as possible, a statement or brief representing the opinion of your company with respect to the classes of depreciable [fol. 187] property (by groups if practicable), the method of ascertaining the service life and salvage value, the basis upon which depreciation charges should be accrued, the necessity for accruals, the relation of maintenance charges to depreciation and the manner in which the percentages of depreciation applicable to the several classes of property should be determined.

"It is also desired that you incorporate in the statement any suggestions or procedures which in your judgment will aid the Commission to reach a just and reasonable determination of the questions involved.

"It will be much appreciated if you will advise me of the approximate date of your statement may be expected.

"Yours very truly, Frank S. Fowler, Chief of Depreciation Section."

That in response to this letter, Mr. Heiss wrote Mr. Fowler, under date of March 24, 1921, setting forth in behalf of the Bell System the view, opinions and suggestions endorsed by those companies, responsible to the third and fourth paragraphs of the above letter.

That the rates put into effect on August 1, 1919, when the federal government surrendered the possession and control of plaintiff's [fol. 188] property, as above set forth, have been maintained in effect pursuant to said order up to the present time.

That under date of December 30, 1921, pursuant to the requirement of the Interstate Commerce Commission, plaintiff filed with said Commission the said specific rates of depreciation so put into effect on August 1, 1919.

That under date of March 10, 1923, the Interstate Commerce Commission issued an Order No. 14700, setting the date of May 1, 1923, at 10:00 A. M. at Washington, D. C., for the beginning of the presentation of evidence. That said Order had attached thereto a report of the preliminary investigation of depreciation charges of telephone companies and the conclusions and recommendations of the depreciation section for the regulation of such charges.

That in the meantime, the plaintiff has been and is now co-operating with Mr. Heiss in an endeavor to furnish the data necessary to enable the Commission to prescribe, under the Act of Congress aforesaid, the classes of plaintiff's property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall thereafter be charged by the plaintiff with respect to each class of property.

[fol. 189] That the "Reserve for Accrued Depreciation" of the plaintiff company as of December 31, 1922, is not more than suffi-

cient for the telephone property that is owned and is being operated by the said company.

To compare the "Reserve for Accrued Depreciation" with the amount of physical depreciation existing in the plant, as the majority opinion undertakes to do, is to compare factors which are not comparable, for the reason that physical depreciation, commonly referred to as per cent condition, is a factor of present physical condition, and as such is but one of the many factors to be considered from the view point of current expense of depreciation, which is the problem of distributing the total amount thereof concurrently month by month over the life in service of the plant by a proper recognition in current expenses.

As heretofore pointed out the so-called reserve here under discussion is in fact a debit account and not a source of current funds for this or any other purpose; and the resources indicated thereby are in fact among the general assets of the Company and to deny a current expense by recourse to these assets, which is the necessary [fol. 190] result of carrying the order of majority of the Department into effect, is to compel the meeting of a current expense by a recourse to plaintiff's general assets and an arbitrary dissipation of plaintiff's assets in lieu of providing current rates sufficient to meet the current expense of depreciation.

That, in my judgment, a rate of depreciation of three and one-half per cent is totally inadequate and insufficient to cover the expense of depreciation that is and will be experienced in the property. That said rate of three and one-half per cent is stated by the majority order to be designed to decrease the amount of the reserve which is erroneous in principle in that it admittedly does not cover for the period in question the pro rata of the amount of depreciation actually to be experienced. That from numerous studies and calculations I have never found from the actual experience of the company a rate in the aggregate of less than five and one-quarter per cent.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 191] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF P. H. COOLIDGE—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

P. H. Coolidge, being first duly sworn, deposes and says: That he is a graduate of the Massachusetts Institute of Technology in the class of 1894. That he has been employed by The Pacific Telephone and Telegraph Company since August 1, 1909, and prior to that time, from 1897, was employed by the Western Electric Company, and that he has had more than twenty-five years' experience in the telephone business.

[fol. 192] That since January 16, 1917, he has been General Commercial Superintendent of The Home Telephone and Telegraph Company of Spokane, in which positition he has charge and supervision of the making of schedules of rates for The Home Telephone and Telegraph Company of Spokane and the preparation of studies in relation thereto, including studies of the effect of rates on the revenues of that Company. That he is familiar with all the rates and charges which are made by The Home Telephone and Telegraph Company of Spokane for telephone service and facilities furnished by that Company and with the schedules of such rates which are now and have been from time to time filed by that Company with the Department of Public Works and its predecessor, the Public Service Commission of Washington, and with the various changes in rates, so filed, which have from time to time been made. That the exchange rates which The Home Telephone and Telegraph Company of Spokane now has in effect for telephone service have been continuously in effect since April 1, 1919.

That he is familiar with the order of the Department of Public Works of Washington, dated March 31, 1923, signed by two members of said Department, and also with the order made on the same [fol. 193] date, signed by the third member of said Department.

That he has made a careful estimate of the revenue which will be derived by The Home Telephone and Telegraph Company of Spokane for the year 1923, in the event that the rates, both toll and exchange, now and since 1919 in effect shall continue in effect throughout said year, taking into consideration the probable growth in the number of telephones which will be experienced and the growth in toll business. That as a result of this estimate, in his opinion, the revenue of The Home Telephone and Telegraph Company of Spokane, which will be derived under the present rates for the year 1923, will be the sum of $1,284,000.00.

That he has also made an estimate of the effect on the revenue of The Home Telephone and Telegraph Company for the year 1923,

if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect throughout said year, and from this estimate has determined that, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect for the year 1923, the revenue of The Home Telephone and Telegraph Company for that year would have been the sum of $1,549,000. That in his opinion, the return to the Home Company even under [fol. 194] the minority rates, while greater than under the rates now and since 1919 in effect, would be less than sufficient and less than the rate to which the Home Company is entitled upon its property used and useful in rendering telephone service, and that the service to be had by subscribers under those rates would be worth more to them than the charges therefor.

That he has had a long experience in making estimates of the amount of revenue to be derived under different schedules of rates for varying periods in the future, and it has been his experience that estimates so made by him approximate closely the results actually experienced. That, in his opinion, the estimates made by him for the Home Telephone and Telegraph Company of Spokane for the year 1923, under the two schedules of rates has hereinabove set forth, are substantially correct and that the results actually experienced thereunder will not vary to any material extent from the said estimates.

P. H. Coolidge.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 195] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of Henry L. Gray—Filed Apr. 24, 1923

State of Washington,
County of King, ss:

I, Henry L. Gray, being first duly sworn, depose and say:

My age is forty-two years. I was educated at the University of Missouri. I reside at Seattle, Washington, where I maintain an office at 40 Henry Building, from which I engage in the practice of civil and electrical engineering, specializing in the valuation of public utility properties; in rate and service investigations and re- [fol. 196] ports on public utilities for investment houses. My engi-

neering training and experience extend over a period of approximately twenty-four years. My preliminary training was acquired in connection with telephone and railroad construction. For the past sixteen years, I have been continuously engaged in work involving valuations of properties of public service corporations, a general outline of such work being as follows:

In 1906, I was employed by the Railroad Commission of Washington as Assistant Engineer in connection with the valuation of railways then being conducted by that state. In 1908, I became Chief Engineer; and in 1911, and through a change of name of the regulatory body, I became Chief Engineer of the Public Service Commission of Washington, and continued in that capacity until February 1, 1913. My work with the Railroad Commission and Public Service Commission of Washington consisted to a large extent of the valuation of public utility properties of all kinds, including telephone properties; and in public utility rate and service investigations.

On February 1, 1913, I opened my office in Seattle as consulting engineer, specializing in public utility work; and since that date [fol. 197] my work has consisted practically altogether of valuations and rate and service investigations for public utilities, municipalities and regulatory bodies, and in the preparation of reports on existing and proposed public utility projects for investment houses. My work as engineer in private practice has called for a close study of the subject of the valuation of pulblic utility properties, and has required my appearance in valuation and rate cases before the regulatory bodies of Washington, Oregon, Idaho, California and Illinois, as well as before special commissions in Canada.

In my work, since 1906, I have appraised 63 different public utility properties. In the case of nine of these properties, I acted as principal assistant to the engineer in charge; while in the case of the remaining fifty-four properties, which represented an investment of more than Five Hundred Million Dollars ($500,000,000.00), I was engineer in charge of all work. Of these fifty-four properties, ten were telephone systems, consisting of the plant of the Independent Telephone Company of Seattle, the plans of the Northwest Telephone Company in Snohomish County, Washington, and the plants owned by The Pacific Telephone and Telegraph Company in Seattle, [fol. 198] Spokane, Tacoma, Everett, Bellingham, Centralia, Olympia and Bremerton, all in the State of Washington. In addition, I have been connected in a consulting capacity with a number of other appraisals, generally for the purpose of appraising some particular class of property, or investigating some particular feature of the case. I am familiar with the methods employed by experts, commissions and courts in arriving at the values of public utilities, and with the general trend of labor and material costs.

Since May 1, 1922, I have been continually engaged in an examination of the property and affairs of The Home Telephone and Telegraph Company of Spokane, and in a determination of the value of the property devoted to public use by said company. As

the result of this investigation, I am convinced that the value of such property, on the 31st day of December, 1922, was in excess of Five Million, Eight Hundred Fifty Thousand Dollars ($5,850,000.00). My reasons for this conclusion are as follows:

The value of the property in question will be represented by its reasonable reproduction cost, less accrued depreciation, plus a fair allowance for what is ordinarily known as going value. Due to the [fol. 199] sudden and unprecedented increase in construction costs following the beginning of the World War, and to the possibility that such high prices may continue for a considerable period, it is admittedly difficult to arrive at what might be called a reasonable reproduction cost. Diagrams "A" and "B" attached hereto show that during the period from the end of the panic, in 1896, to about the beginning of the year 1915, there was a steady and almost uniform increase in the average costs of labor and materials, as evidenced by the Wholesale Commodity Price Index Numbers, computed and published by the United States Bureau of Labor Statistics. But following the year 1915, there was a heavy increase in labor and material costs, the peak of such costs being reached about the middle of the year 1920. Following this peak, there was a marked decline in prices, which continued until about the beginning of the year 1922; but since the early part of that year, there has been a general increase in wholesale commodity prices and a very substantial increase in the costs of labor and materials entering into construction. On April 1, 1923, the average cost of construction labor and materials was approximately thirty per cent higher than the corresponding costs of April, 1922, and were only twenty-two per cent less than the peak costs of 1920. The present trend of prices is decidedly up- [fol. 200] ward, and this condition has existed for more than a year. It is impossible to predict to what extent this increase will continue, but at the present time there is no indication of any recession in construction or maintenance costs. On the contrary, all of the data available indicates a still further increase in such costs, as labor costs in general are advancing. It is difficult to abandon the idea that present-day costs eventually will recede, but as to when this will occur, no one can say; and it is generally conceded that a new price level has been established and that construction costs never again will reach pre-war levels. Under the circumstances as recited, the difficulties of arriving at what might be termed "a reasonable reproduction cost" are obvious.

The reproduction cost of the property in question, as of June 30, 1922, less accrued depreciation and plus a reasonable allowance for going value, was found by The Home Telephone and Telegraph Company of Spokane to be $7,171,800.00. I have made a study of this reproduction cost estimate, of the going value calculation and of the accrued depreciation in question, and am convinced that the above amount, or $7,171,800 stated by The Home Telephone and Telegraph Company of Spokane to represent the reproduction cost of its [fol. 201] property as of June 30, 1922, less accrued depreciation and plus going value, is reasonable, fair and conservative. This, if

added to the cost of additions to the property of the said company between the dates of June 30, 1922, and December 31, 1922, which I find to have been $210,684.00, would give a resulting reproduction cost less depreciation plus going value as of the latter date, of $7,382,484.00. In the absence of any unusual conditions, this might be considered to be the fair value of property in question.

It is my opinion that in fixing value, the possibility of the ultimate recession in prices must be taken into consideration; and that to base the value of a property solely upon labor and material costs of the present would be unwise; and that in arriving at such value the construction costs of the present should be discounted to some extent—and the determination of the proper discount is the problem.

Diagram "B" attached hereto shows the general similarity of the graphs of Wholesale Commodity Price Indices during the years 1914 to 1923, inclusive, as computed and published by the Bureau of Labor Statistics, and the corresponding Construction Cost Indices computed and published by the Engineering News-Record. Dia- [fol. 202] gram "A" attached shows the graph of Wholesale Commodity Price Indices during the period from 1890 to 1923; and from this diagram it is apparent that had the World War not occurred, that prices might have been expected to follow the general upward trend indicated by the Trend Grade Line from the end of the panic in 1896 to the beginning of the year 1915; and that therefore on June 30, 1922, commodity prices in general would have been approximately thirty-eight points or twenty-four per cent less than the corresponding prices actually prevailing upon that date.

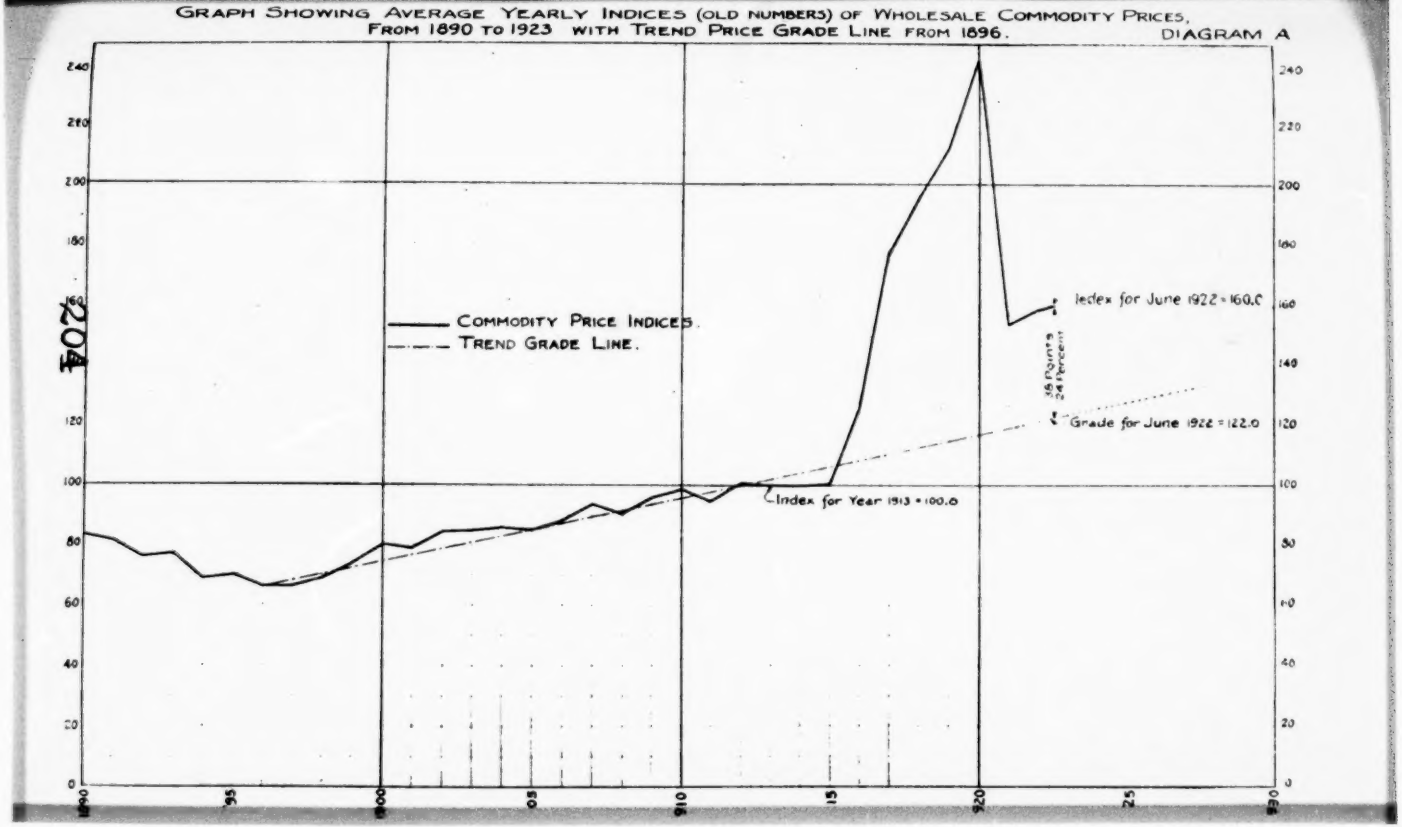
Applying a reduction factor of twenty-four per cent to the reproduction cost less depreciation of the property in question as of June 30, 1922, and adding a reasonable allowance for going value, would result in a total of $5,655,264.00; which, when there is added thereto the cost of additions to the property of the said company during the last six months of the year 1922, or $210,684.00, will give a total value of $5,865,948.00. Therefore, I believe that the fair value of the property in question, or that owned and used for the public convenience by The Home Telephone and Telegraph Company of Spokane on December 31, 1922, is in excess of Five Million Eight Hun- [fol. 203] dred Fifty Thousand Dollars ($5,850,000.00).

Henry L. Gray.

Subscribed and sworn to before me this 23rd day of April, 1923. J. E. Peterson, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

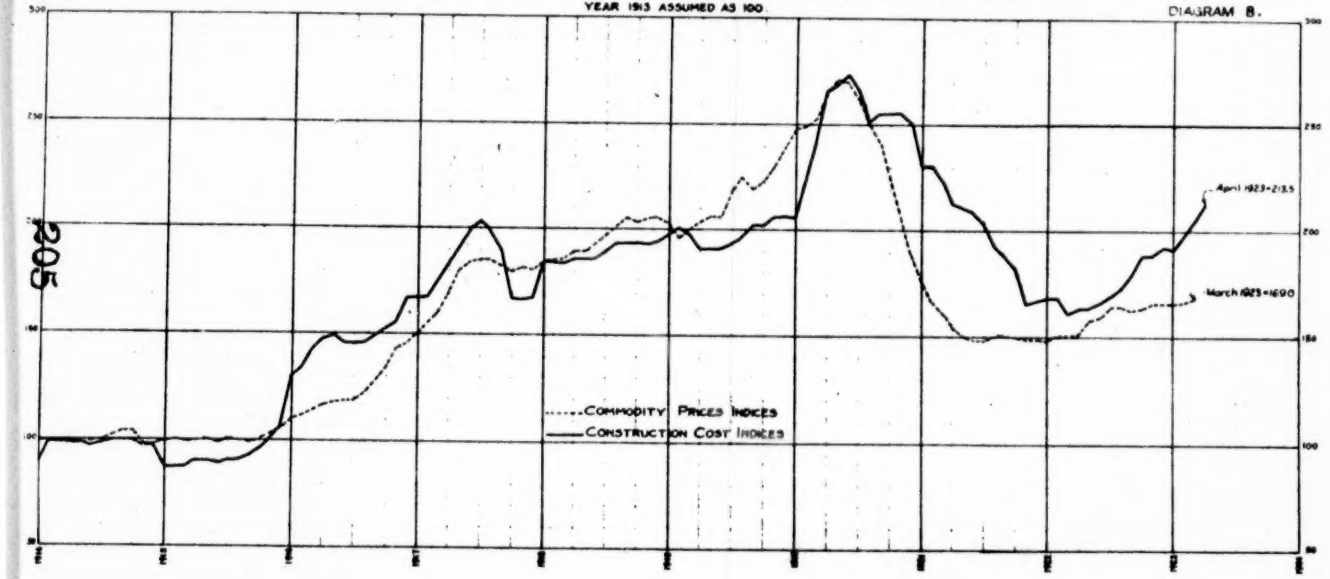
(Here follow diagrams A and B, marked side folio pages 204 and 205)


GRAPH SHOWING AVERAGE YEARLY INDICES (OLD NUMBERS) OF WHOLESALE COMMODITY PRICES,
FROM 1890 TO 1923 WITH TREND PRICE GRADE LINE FROM 1896.
DIAGRAM A
INDEX
COMMODITY PRICE INDICES.
TREND GRADE LINE.
Index for June 1922 = 160.0
Grade for June 1922 = 122.0
38 Points
24 Percent
Index for Year 1913 = 100.0
240
220
200
180
160
140
120
100
80
60
40
20
0
1890
95
1900
05
10
15
20
25
30

GRAPHIC COMPARISON OF WHOLESALE COMMODITY PRICES AND CONSTRUCTION COSTS 1914 TO 1923.

YEAR 1913 ASSUMED AS 100.

DIAGRAM 8.



[fol. 206] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF R. LEWIS RUTTER—Filed Apr. 24, 1923

STATE OF WASHINGTON,
County of Spokane, ss:

R. Lewis Rutter, being first duly sworn says: that he is a resident of the City of Spokane in said County and is an investment banker; that he is the President of the Spokane & Eastern Trust Company, a corporation organized under the laws of the State of Washington, which has been doing a banking, trust and investment business for more than thirty years in the City of Spokane and vicinity; that he has been with said investment house for 28 years continuously and for the past seven years has been President thereof; that said corpora-
[fol. 207] tion is a member of the Investment Bankers Association of the United States.

Spokane & Eastern Trust Company, aforesaid, deals extensively in investment securities of the classes offered to what are known in banking circles as the conservative investor, and it therefore confines its purchases and sales of securities to those which it considers to be conservative investments, and is, and for many years has been, one of the largest houses in Spokane handling public utility securities; that it is the practice of deponent's said house to make an investigation of the operations of any public utility before it deals in the securities of such utility; that when a proposal is made to it to handle such securities it first makes a preliminary investigation of the facts and figures relating to the company generally in order to determine whether or not there is a safe basis for the bonds or other securities which it asked to handle, and if that matter is determined satisfactorily the investigation is continued by having an engineering examination made by competent engineers and accounting examinations made by expert accountants.

That it is the opinion of the deponent that a public utility such as
[fol. 208] the plaintiff should earn an annual return of not less than 8 per cent (after providing for depreciation) upon the fair and reasonable value of its property used or useful in the rendition of its service in order to place its securities upon a parity with other investments competing for funds in the market.

That in order to make the securities of a public utility saleable, it is necessary that public confidence in such securities be established and maintained. The investors must have reasonable assurance of the integrity of the investment and the safety of their money, and must be afforded a return at least equal to the returns which they could obtain through other available investments of similar desirability.

That the cost to public utilities of borrowed money, where the

loans are adequately secured and where there is a fixed obligation to return the money borrowed at a definite date, is obviously less than the fair return necessary to induce the investment of funds that are to be invested at the risk of the business. That the cost of borrowed money to public utilities during the last three years has run as high as 10 per cent for short term loans and has averaged over 7 per cent for long time money. That at present such corporations cannot obtain money on long time loans, even though adequately secured, at [fol. 209] less than an average cost of approximately 6 per cent. That prudence and conservatism dictate that only a proportion of the capital requirements of such corporations should be raised by the sale of bonds or other loans. That it is fundamental that public utilities which expect to continue permanently in business and which are required continuously to increase their investments in order to meet the public service requirements imposed upon them, must have a market for their stocks, and their stocks are not salable to investors unless it can be demonstrated that the company offering such stocks is earning and will continue to earn at least a reasonable return upon the value of its property devoted to the public use. That there is active competition among utility corporations, industries and other businesses for the surplus funds which are at any time available for new investments and a telephone company like the plaintiff is compelled to meet this competition and to offer inducements to investors equal to those offered by others at the same time.

R. Lewis Rutter.

Subscribed and sworn to before me this 20th day of April, 1923. H. V. Davis, Notary Public in and for the State of Washington, Residing at Spokane. (Notarial Seal.)

[File endorsement omitted.]

[fol. 210] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That I have read the affidavit of Alex M. Winston dated April 27, 1923, in the above entitled cause. That the matter of increased maintenance expenses has been thoroughly examined into by the engineers of the Commission and the cause for the increase

thoroughly explained in exhibits filed before the Department of Public Works, in the matter referred to in the bill of complaint herein; that the principal causes of this increase are the increase in the amount of business over the period in question and the increased wage cost, due to war and other conditions.

[fol. 211] That despite the impression given in the comparison between maintenance expense and expense of depreciation, there is no over-lapping of these two expenses, as in accordance with the accounting instructions the two expenses are entirely separate and distinct.

That it is not a fact that no evidence was introduced to show the value of the various services rendered under the so-called 4½% contract, but that in General Exhibit "X" of the Department, a comprehensive showing was made on this point, showing that the value of the service rendered was considerably in excess of the payment thereunder.

That the statement that the value of all the exchanges in the State of Washington, including the Spokane Exchange, exclusive of toll lines, is $19,000,000 in round numbers, is erroneous because it gives no consideration to the item "construction work in progress," which item was allowed by the Department of Public Works; further, that these figures are the so-called rate base figures of the Department and not the value of that property. Also that the figure of $5,000,000 quoted for the value of the long distance lines is similarly erroneous.

That on page 9 of Mr. Winston's affidavit, he states that the net earnings of the Home Company is 3.78% on the company's fair value. From the calculations immediately following this figure, it appears that said Winston is referring to the rate of return of 3.378% shown in Department's Exhibit No. 4, page 7, which figure gives consideration to the 4½% payment and to depreciation and is not calculated on the company's fair value, but upon the Department's rate base, excluding construction work in progress. This rate base was not approved in the majority opinion, but the rate base including [fol. 212] "construction work in progress" was approved. Further, from this same exhibit, prepared by the Chief Engineer of the Department, it is shown that the earnings of the Home Company have been as follows:

Year	Return
1915	1.25%
1916	3.75%
1917	2.22%
1918	1.03%
1919	3.02%
1920	1.83%
1921	2.41%
1922 (six months)	3.29%

Included in these figures have been the actual expenses of depreciation, as shown by the books of the Home Company which are given in detail in City of Spokane's Exhibit "2," page 19, said exhibit be-

ing prepared by an expert accountant employed by the City of Spokane.

The relation of the expense of depreciation to the depreciable property is shown as follows:

Year	Per cent
1915	6.66%
1916	5.33%
1917	6.00%
1918	6.18%
1919	5.52%
1920	5.59%
1921	5.51%
1922 (six months)	5.65%

Upon the assumption that the rates of depreciation as shown were changed to conform to the rate stated in the majority order, namely 3½%, the net earnings of the Home Company for the same years would be as follows:

1915	4.01%
1916	5.18%
1917	4.17%
1918	3.11%
1919	4.68%
1920	3.54%
1921	4.22%
1922 (six months)	5.11%

[fol. 213] Mr. Winston's affidavit suggests that the depreciation allowance is excessive in the amount of $75,000 per year. This conforms closely to the 3½% allowance of the majority opinion, and over the eight years in question, had the expense of depreciation been $75,000 per year less, the reserve instead of being approximately $900,000 at the end of the year 1922, would have been $300,000, and the average net earnings over that period shown in detail in the tabulation just above, would have been approximately 4¼% per year. Had the expense for depreciation been so adjusted as to have entirely wiped out the reserve, the average net earnings under that assumption would have been approximately 5¼% per annum.

That the suggestion in the affidavit of Mr. Winston that the fair allocation of toll revenues should be $80,000 per annum greater is contrary to the decision of the Department and further that the existing payment of 30% is as much or greater than has generally been approved by commissions or courts.

That numerous errors occur in the said affidavit of minor importance, but which do not seem material to the present hearing, and therefore are not referred to.

(Sgd.) C. E. Fleager.

Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[File endorsement omitted.]

[fol. 214] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF W. J. PHILLIPS—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, W. J. Phillips, being first duly sworn, depose and say: That I am Commercial Superintendent of the plaintiff The Home Telephone and Telegraph Company of Spokane, and reside at Seattle, Washington; that I have examined the records of the company and find that during the five (5) months ending March 31, 1923, there were in the Spokane Exchange nineteen hundred three (1903) telephone stations disconnected for all reasons, an average of three hundred eighty-one (381) per month.

That in the Spokane Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than twenty-two thousand (22,000) subscribers; that of these 22,000 subscribers, eight thousand one hundred seventy-eight (8,178) are four-party residence subscribers and nine thousand one hundred seventy-six (9,176) are individual and two-party residence subscribers.

That during the year 1922 there was collected for long distance toll messages at the Spokane Exchange a sum in excess of thirty-two [fol. 215] thousand dollars ($32,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the present charge and a higher charge should it be deemed proper to recover it at a later date.

(Sgd.) W. J. Phillips.

Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[File endorsement omitted.]

[fol. 216] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISMISS—Filed Apr. 30, 1923

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court to dismiss the bill of complaint filed herein for the reasons and upon the grounds that as appears upon the face thereof

I. Said bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for.

II. Said bill of complaint does not state facts sufficient to entitle complainant to any relief against these defendants.

Wherefore defendants and each of them pray the judgment of this court whether they shall further answer, and that they be dis-
[fol. 217] missed with their costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 218] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court for an order denying the application for an interlocutory injunction and declaring said restraining order to be void from its inception, and in the alternative, to dissolve said restraining order.

This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[fol. 219] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. V. Kuykendall, being first duly sworn, on oath deposes and says:

That he is one of the defendants named in the above entitled proceeding; that he is now and has been for more than three years last past the duly appointed, qualified and acting Director of the Department of Public Works of said state, and as such charged with the duty of administering the provisions of the "Public Service Commission Law" of said state and the acts amendatory thereof and supplementary thereto. That, during the incumbency of affiant as Director for said Department of Public Works, he has conducted, as provided by law, a large number of investigations involving the properties, rates and service of public utilities operating within the said state, and, in particular, of telephone companies, including plaintiff. That, prior to his incumbency, the Public Service Com-[fol. 220] mission of Washington, predecessor of the Department of Public Works of Washington, had conducted, as by law provided, a large number of investigations of the properties, rates and service of utilities generally and telephone companies operating within the said state. That these investigations have resulted in the accumulation of a large amount of data involving every feature of the construction, operation and maintenance of telephone properties within said state, and this data has at all times been available and has been used by the affiant and the staff working with him in the employ of the state of Washington for examination and comparison in investigations of the sort herein involved, and in particular with respect to the investigation which is the subject of this action.

That affiant has examined and is familiar with the bill of complaint and exhibits, and the affidavits in support of the bill of complaint, filed herein. That there is now and was at the time of the hearing before the Department of Public Works herein substantial agreement between the experts, engineers and accountants in the employ of the state of Washington and acting under the direction

of affiant and the experts, engineers and accountants testifying for the plaintiff herein, with the following exceptions:

(a) Treatment of expense of depreciation;

(b) Treatment of compensation paid to the American Telephone and Telegraph Company.

That the amount of the expense items above designated as (a) and (b) have a controlling effect upon the rate of return shown in any statement prepared to reflect the result of plaintiff's operations.

There are two general methods of determining the amount which should be charged to operating expenses on account of depreciation. [fol. 221] One of these methods may be referred to as the "life table method." It is the method which has been used by plaintiff, and has resulted in the accrual of a balance in its "reserve for accrued depreciation" which amounts to approximately twenty-seven per cent of the original cost of its depreciable property. Stated briefly, the application of the life table method is substantially as follows: A given group of plant units is found to have an average life in service of ten years, with no salvage value. It therefore follows, under a computation made on this basis, that the average annual rate of depreciation will be ten per cent. The amount obtained by application of this percentage is set aside annually in the depreciation reserve in order that when the property reaches the end of its useful life there may be in the reserve an amount equal to its original cost. This method inevitably results in building up a credit balance in reserve for the reason that, in a constantly growing plant, the annual retirements will not equal the annual credits to the reserve account.

The affidavit of one C. E. Fleager, on file herein, states in part as follows:

"The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account 'reserve for accrued depreciation' are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance."

The Uniform System of Accounts, prescribed by the Interstate Commerce Commission for telephone companies and adopted by defendants for the keeping of accounts of companies such as plaintiff, provides as follows (p. 67):

"Depreciation of Plant and Equipment.—Telephone companies [fol. 222] should include in operating expenses depreciation charges for the purpose of creating proper and adequate reserves to cover the expenses of depreciation currently accruing in the tangible fixed capital. By expense of depreciation is meant—

"(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

"(b) Obsolescence or inadequacy resulting from age, physical change, or supersession by reason of new inventions and discoveries, changes in popular demand, or public requirements, and

"(c) Losses suffered through destruction of property by extraordinary casualties."

The classification of accounts duly and regularly promulgated by the defendants in compliance with law, and in which form plaintiff is required to keep its accounts, does not provide as an element of the expense of depreciation "a coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which can not be exactly known in advance," nor is such an item of depreciation expense properly allowable.

The second method of determining expense of depreciation may be designated the "retirement method." In the application of this method a period of years of the past operations of the property is analyzed to determine the original cost of those items of the plant which have had to be replaced. The sum of these retirements for the period analyzed is divided by the number of years in the period, which gives an average annual retirement in dollars: that is to say, the actual average annual necessities of the utility in providing for retirement of its property over the period analyzed is thus ascertained. This actual experienced expense, when related to the average plant value for the period, gives a depreciation percentage which in a growing plant, is uniformly less than the annual percentage obtained by applying the life table method. Under the retirement method, the reserve, if it exists at all, is very small in its relation to [fol. 223] the plant value.

Affiant states that the record made before defendants indicates that the rate for depreciation which plaintiff has heretofore used was too large and its application has resulted in the accrual of a reserve which is larger than the plaintiff's necessities require and is in excess of the amount the rate payer should be required to provide to cover expense of depreciation. Affiant further says that from the record made before defendants it appears that the property being currently installed by plaintiff is in large part property of longer life, and hence less rapidly depreciable, than the property heretofore installed: that, in view of this fact, and the size of the depreciation reserve, as computed by plaintiff, and the necessary result of the calculation of the expense of depreciation resulting from the application of the method employed by plaintiff, a reduction in the rate of allowance for depreciation expense employed by plaintiff should be made for a period of two years in the future, and that such new rate of depreciation as set forth in the order herein is both reasonable and proper and subject to such future readjustment as the facts may warrant. The effect of this reduction over a period of two years will be to diminish the percentage relation of the depreciation reserve to the cost of the depreciable plant. After proper relation of the depreciation reserve to the cost of the depreciable plant has been once established, the charge to operating expenses on account of depreciation can be more accurately determined.

Affiant says that in the bill of complaint filed herein there are certain allegations, and, in the supporting affidavits also filed herein, there are certain statements regarding the "cost of property," "book [fol. 224] cost of property," "cost of reproduction," and "present fair value" of the properties of plaintiff. That neither in the bill of complaint nor in the supporting affidavits are the details and component figures of these various costs and values set forth, nor are the relation or comparison of these figures, costs and values to the rate base employed by affiant herein set forth. That in the entry of the order herein a valuation for rate making purposes was determined after due and full consideration of all the elements of value required by law to be considered in such a case, and that the valuation herein named by defendants is the just, fair and reasonable value for rate making purposes of the property of plaintiff.

That affiant has read and is familiar with the contents of an affidavit of one C. S. Cassassa, filed herein. That said affidavit contains income statements for the years 1919, 1920, 1921, and 1922, showing the per cent net revenue claimed to have been earned by plaintiff form its operations during said years. That affiant has caused these income statements to be changed in two respects and presents the results herewith. That said changes consist in (a) changing the amount of depreciation and amortization allowance to an allowance of three and one-half per centum in accordance with the findings of fact made by the affiant herein, and (b) changing the amount of the allowance to the American Telephone and Telegraph Company under the so-called four and one-half per centum contract to an allowance of ninety cents per station in accordance with the findings of fact of the affiant herein.

[fol. 225] 1919

Average Cost of Property

Total	$3,823,462	(unchanged)

Telephone Revenues

Total	$932,032	(unchanged)

(a) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Depreciation & Amortization	$36,157	
Total Telephone Expenses (Revised)	$783,040	
Net Telephone Revenues	$148,992	
Per cent Net Revenues	3.89%	

(b) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$16,594	
Total Telephone Expenses (Revised)	$802,603	
Net Telephone Revenues	$129,429	
Per cent Net Revenues	3.38%	

(c) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Depreciat. & Amort. and Licensee Con. Exps.	$52,751	
Total Telephone Expenses (Revised)	$766,446	
Net Telephone Revenues	$165,586	
Per cent Net Revenues	4.33%	

[fol. 226] 1920

Average Cost of Property

Total	$3,830,672	(unchanged)

Telephone Revenues

Total	$1,098,074	(unchanged)

(a) Telephone Expenses

Total	$1,029,503	(unchanged)
Reduction in Allowance for Depreciation & Amortization	$38,761	
Total Telephone Expenses (Revised)	$990,742	
Net Telephone Revenues	$107,332	
Per cent Net Revenue	2.80%	

(b) Telephone Expenses

Total	$1,029,503	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$22,067	
Total Telephone Expenses (Revised)	$1,007,436	
Net Telephone Revenues	$90,638	
Per cent Net Revenue	2.37%	

(c) Telephone Expenses

Total	$1,029,503	(unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	$60,828	
Total Telephone Expenses (Revised)	$968,675	
Net Telephone Revenues	$129,399	
Per cent Net Revenue	3.38%	

[fol. 227] 1921

Average Cost of Property

Total	$3,890,585	(unchanged)

Telephone Revenues

Total	$1,180,929	(unchanged)

(a) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in allowance for Depreciation & Amortization	$42,940	
Total Telephone Expenses (Revised)	$1,046,521	
Net Telephone Revenues	$134,403	
Per cent Net Revenue	3.45%	

(b) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$23,715	
Total Telephone Expenses (Revised)	$1,065,746	
Net Telephone Revenues	$115,178	
Per cent Net Revenue	2.96%	

(c) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in Allowance for Depreciat. & Amort. and Licensee Con. Exps.	$66,655	
Total Telephone Expenses (Revised)	1,022,806	
Net Telephone Revenues	$158,118	
Per cent Net Revenue	4.06%	

[fol. 228] 1922

Average Cost of Property

Total	$4,113,901	(unchanged)

Telephone Revenues

Total	$1,226,223	(unchanged)

(a) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Depreciation & Amortization	$48,053	
Total Telephone Expenses (Revised)	$1,051,713	
Net Telephone Revenues	$174,510	
Pet cent Net Revenues	4.24%	

(b) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$24,246	
Total Telephone Expenses (Revised)	$1,075,520	
Net Telephone Revenues	$150,703	
Per cent Net Revenues	3.66%	

(c) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Depreciation & Amort. and Licensee Con. Exps.	$72,299	
Total Telephone Expenses (Revised)	$1,027,467	
Net Telephone Revenues	$198,756	
Per Cent Net Revenues	4.83%	

[fol. 229] The controversial matters are the two items of expense. (1) depreciation, (2) compensation to the American Telephone and Telegraph Company under the licensee contract. Defendants have reduced the annual depreciation charge for a period of two years to three and one-half per centum and have fixed the compensation under the said contract at ninety cents per station instead of four and one-half per centum of the gross operating revenue. Such action is not capricious or confiscatory but is fully warranted by the facts.

Further than this deponent saith not, save that this affidavit is made in support of a motion to dissolve the temporary restraining order heretofore issued herein.

E. V. Kuykendall.

Subscribed and sworn to before me this twenty-eighth day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia. (Notarial Seal.)

[File endorsement omitted.]

[fol. 230] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of Alex M. Winston as to Value of, and Earnings of, the Home Telephone and Telegraph Company of Spokane—Filed Apr. 30, 1923

State of Washington,
County of King, ss:

Alex M. Winston, being first duly sworn, on oath deposes and says: That he resides in the City of Spokane, State of Washington; that he is fifty years of age and has been engaged in the practice of law ever since the month of August, 1893; that for the past seven years, he has been the Assistant Corporation Counsel of the City of Spokane, Washington, and, as such, has conducted all litigation of the City of Spokane in State and Federal courts and before commissions; that during that period of time, he has been before the Public Service Commission of the State of Washington and its successor in duties, the Department of Public Works of the State [fol. 231] of Washington, in many matters concerning the value of, the income of, and the rates of, public utilities, including rates for telephonic, street car, electric light, electric power and gas companies; that during his said work, he has been compelled to attend many hearings, has consulted with many engineers, and has done much studying of the questions hereinbefore referred to, and especially as to questions concerning values of telephone plants and systems, their earnings, and their rates; that he represented the City of Spokane in the hearings before the Department of Public Works referred to in the bill of complaint herein, and this affidavit is based upon the undisputed testimony admitted and received at said hearings, in addition to the general information possessed by affiant.

That The Home Telephone and Telegraph Company of Spokane is a separate corporate entity from The Pacific Telephone and Telegraph Company, although it is wholly controlled by said latter com-

pany by virtue of stock and bond ownership; that at the said hearings in the bill of complaint herein referred to, by order of March 31, 1923, the Department of Public Works of Washington fixed the value of the property of The Home Telephone and Telegraph Company of Spokane, used and useful in the public service, at the sum of $3,892,000; that, prior to 1914, there were two telephone systems in the City of Spokane, one being a part of The Pacific Telephone and Telegraph Company's general system on the Pacific Coast (which will be hereinafter designated the "manual system"), and the other, a much smaller system, the property of The Home Telephone and Telegraph Company of Spokane, an automatic system (which will hereinafter be designated the "automatic system"); that, in order to [fol. 232] remove competition, The Pacific Company purchased the proper of the Home Company and the two systems were consolidated; that at about this time, the franchise of the Pacific Company to operate its system in Spokane having expired and it being unable to obtain a new franchise, an obstensible purchase was made by the Home Company of the Pacific Company's property and, since said time, the exchange in Spokane has been operated by the Home Company as a manual exchange; that the property of the Home Company, as now constituted, consists exclusively of property in the City of Spokane and suburbs, and does not include any long distance lines; that in or about the year 1914, a valuation was placed upon the property of the then Pacific Company of $3,467,675.01, this valuation having been made by the then Public Service Commission of Washington; that in this valuation was included the original manual exchange, together with such property of the automatic exchange as was consolidated with the manual exchange it amounting to about $300,000, according to the books of the Home Company, as they were set up by it on January 1, 1915; the valuation then made as to the manual exchange property was made by the Commission for the purpose of fixing a rate base for rate making purposes; that no allowance was made at said time by the Commission for depreciation, and it is the fact, and was admitted at the hearings referred to in the bill of complaint herein, that said property was in fact in a physical condition of not to exceed 90%; that said order of the Public Service Commission made at said time as to said valuation has never been vacated, modified or appealed from and is still in full force and effect; that, under the statutes of the [fol. 233] State of Washington, as construed by the Supreme Court thereof, the said valuation is fixed and final; that since the time of said valuation, additions and betterments have been made to said plant, so that, without taking into consideration the depreciated condition of the plant of The Home Telephone and Telegraph Company of Spokane, its property, used and useful now devoted to the public use, is worth $3,864,081.51; that in this, however, there is not included approximately $100,000 for certain underground conduits and cables not connected with the central office of the company and not devoted to the public use, which have been in existence for a period of more than eight years; that the actual value

of the company's property devoted to the public use, allowing for depreciation, would be $3,478,573; that at the hearings in the present cause, the cost of reproduction of this plant at or near the present time was fixed by the Department of Public Works at $5,900,000; that the Department of Public Works, however, in its order of March 31, 1923, after considering the condition of the property, its actual performance, appraisal cost, and the cost of reproduction, less depreciation, from all of said figures arrived at the fair value of the property used and useful, devoted to the public use, at the sum of $3,892,000, as of date June 30, 1922; that the Home Company's engineers and accountants at these hearings, following their usual custom, proceeded to find, as did the engineers and accountants for the Commission, that the net earnings of The Home Telephone and Telegraph Company of Spokane, in the year 1921 and, by the use of figures for the first six months of 1922 and the adoption of these figures for the last half of the year 1922, were small; that there was some difference between their figures, occa-
[fol. 234] sioned by a reduction of about 20% in the depreciation rate made by the Department's engineers over that allowed by the Company's engineers, and a similar increase by the Department's Engineers over those of the Company's as to the allocation of long distance toll receipts, which will be hereinafter referred to.

Depreciation

That, while there were not available in the statewide case specific allocations of depreciation to the different exchanges in the State of Washington, such information was available in the Spokane case, the Home Company being a separate corporate entity; that the books of the amalgamated company, by which I mean the automatic and manual exchanges, were set up on January 1, 1915; that it is a fact, and was admitted to be such at the hearings by counsel for the utility, that depreciation had accrued prior to that time and that allowances had been made, the nature of which were akin to those thereafter made; that the annual allocation for depreciation, beginning with January 1, 1915, was at the rate of $175,000 per year, and, as admitted by counsel for the Company at that time, a comparatively similar rate of depreciation, considering the amount invested, had been previously charged; that this rate of depreciation was approximately 5.89 per cent; that at the end of the year 1921, from this $175,000 per year placed in the depreciation fund, there had been expended a much less amount, so that at the end of the year 1921 there remained unexpended in said depreciation fund the sum of $751,000, and at the end of the year 1922 an additional sum of $150,000, over and above expenditures to replace depreciated property, had been added to said fund; that at the outset of the period
[fol. 235] beginning January 1, 1915, the expenditures from the depreciation reserve fund amounted to over $100,000 per year; that they have been constantly and continually decreasing until, in the year 1921, the expenditures from this fund amounted to only $31,000, while at the same time the expenditures from the mainte-

nance fund, which was somewhat under $100,000 during the first year or two of its creation, have increased about 100%, so that whereas, beginning with 1915, the expenditures for the replacement of depreciated property have decreased more than 60%, the expenditures from the maintenance fund have increased about 100%; that it is a fact, and was admitted by the utility at the hearings, that the average plant life of its property was fifteen years and that there was nothing to indicate that the fifteen year period previous to this time was any different from the average period, and that there was nothing to indicate that there were any unusual expenditures from said depreciation fund called for in the near future; that no interest upon the amount in said depreciation fund was charged against the company; that the foregoing statements in regard to depreciation are facts and were undisputed by the company at said hearings; that from such facts affiant avers that said depreciation, as a matter of fact, engineers and accountants to the contrary, is based at a figure 100% in excess of what it should be and that the amount thereof is in fact an actual earning of the Home Company, as will be shown by a tabulation hereinafter in this affidavit to be made.

[fol. 236] The Four and One-half per Cent Contract

That it is a fact which was not disputed at the time of the hearings that the only items of services rendered or material furnished by the American Telephone and Telegraph Company to The Home Telephone and Telegraph Company of Spokane which have a fixed or substantial value were the rental of the receivers, transmitters and induction coils; that the other items of service rendered, the monetary value of which was fixed or attempted to be fixed, relate exclusively to services rendered in the transmission of long distance messages; that the items for the use of receivers, transmitters and induction coils were of a value of not to exceed 50% of the whole four and one-half per cent contract; that as to the other items specifically testified to, they were as follows: (1) phantom circuits; (2) repeaters; and (3) loading coils and duplex cables; that it is a fact that as to the phantom circuit, the American Telephone and Telegraph Company (hereinafter called the "parent company") owns no basic patents, and it is a fact that the service rendered in that connection was of no value to the company receiving the same, as it could have had the same service without expense; that it is a fact, and was admitted at the hearing in Seattle, that the phantom circuit was in use during the war, operated successfully in France, and not under the parent company's patents; that it is a fact that as to the repeaters and the loading coils and duplex cables the basic patents thereon have expired; that this fact was admitted by the company; that a claim was made by the company that some minor patents upon these last two items were controlled by the parent company but no evidence was introduced to show what they were or their value, and affiant avers the fact to be that they have no substantial value [fol. 237] to the company receiving such alleged service; that, in any event, none of the services rendered under these three last items

produces any advantage, pecuniary or otherwise, to The Home Telephone and Telegraph Company of Spokane.

The Toll Line Allocation

That, under the figures presented by the Company's engineers and accountants at the hearings, there was allocated to the Spokane exchange for all services rendered by it to The Pacific Telephone and Telegraph Company in the handling of, and collecting for, long distance messages, thirty per cent of the amount received for long distance toll messages originating in the Spokane exchange, and nothing for messages handled in Spokane originating in other exchanges; that it is the fact, and it was so admitted by the company at the hearings, that the actual out-of-pocket cost to the Home Company for so handling said messages was in excess of 39%, and in this was not included anything but direct out-of-pocket costs; that there was nothing included therein for any depreciation of any of the property of the Home Company used in the long distance work, nothing for any rental for any space used in such work, nothing for any overhead of any officers assisting in, and directing the carrying on of, such work, and, finally, nothing for profit to the Home Company for its services; that the amount of the expenditures of the Home Company for these items not included is not shown in the record by any testimony; that the approximate value of all of the exchanges in the State of Washington, including the Spokane exchange, and, of course, exclusive of long distance lines, is $19,000,000, in round numbers, and that the value of the long distance [fol. 238] lines is $5,000,000; that the net earnings at the present time of the long distance lines, having a depreciation rate of practically six per cent, is fifteen per cent per annum, or $750,000 per year; that affiant further avers that the net earnings of the long distance lines at this time is in excess of sixteen per cent per annum.

Net Earnings of the Home Company

That, applying these figures to Spokane, we find that, without regard to any services actually rendered the Home Company under the four and one-half per cent basis, the percentage of income actually earned on the Company's fair value, without considering depreciation, is 3.78%; add to this the—

Percentage of the 4½% contract services performed exclusively for toll lines	$25,000
Additional income to be added under a fair allocation of toll revenues	80,000
Income actually earned wrongfully charged to depreciation, being based upon actual experience for the average life of the plant	75,000
Total	$180,000

Percentage of income actually earned on $3,850,000 not appearing on company's books	4.675%
Actual percentage earned by company on its fair valuation, without considering depreciation	8.053%

That affiant further says that the order of the Department of Public Works of the State of Washington herein sought to be stayed was made public on March 31, 1923, and copies thereof received by the respective cities and The Home Telephone and Telegraph Company of Spokane on April 2, 1923; that at no time until the 26th day of [fol. 239] April, 1923, did affiant or any person interested in this case, save the complainant, have an opportunity to see and know what affidavits have been presented in support of the application for an injunction pendente lite and that it is a physical and mental impossibility to read and construe said affidavits and to prepare seriatim denials thereof prior to the date of the hearing herein; that affiant avers, however, that as a matter of fact The Home Telephone and Telegraph Company of Spokane is actually earning in excess of eight per cent net upon the fair value of its property, and that he believes that fact will be demonstrated when this cause shall have been tried.

That affiant further avers that he has read the affidavit of R. Lewis Rutter on file herein as to what is a reasonable rate of return; that affiant avers that The Home Telephone and Telegraph Company of Spokane should not be permitted to earn eight per cent upon its fair valuation, nor any sum in excess of six per cent, for the reason that the telephone is a monopoly and a necessity which, for practical purposes, must be had by the people, and, being under the protection of the laws of the state and nation, such rate of return is assured, so that, for all practical purposes, stock in the company issued upon a fair valuation is of the same character as would be a bond; that affiant further says that this rate of return would be upon the buildings owned by the company in Spokane at least twice the average rate actually earned upon investments in business property in Spokane.

Affiant further says that The Home Telephone and Telegraph Company of Spokane is operating its system in the City of Spokane, Washington, under and by virtue of the provisions of Ordiance No. A2118 of the City of Spokane, Washington, entitled:

[fol. 240] "An ordinance granting to The Home Telephone & Telegraph Company of Spokane the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the city of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables, by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said city of Spokane, and fixing the compensation to be paid therefor."

as amended by Ordinance No. A 4079 of said City, passed by the City Council April 13, 1909, and approved by the Mayor thereof April 14, 1909, the original franchise ordinance having been adopted by a vote of the people of the City of Spokane at an election held August 11, 1905, pursuant to Amendment No. 61 of the Charter of the City of Spokane; that Section 11 of said Ordinance No. A 2118 is in words, letters and figures as follows:

"Section 11. That all telephone lines constructed or operated under said franchise shall have complete copper metallic circuits, and that the conduit system constructed and laid down under this franchise shall be of such size and capacity as to accommodate wires, cables or conductors sufficient to provide for ten thousand (10,000) telephones.

"That the rent or charge for an unlimited, independent metallic circuit telephone service in the system established or maintained under this franchise, so long as such system does not connect an exchange with more than four thousand (4,000) telephones, shall not exceed four and twenty-five one-hundredths dollars ($4.25) per month; and said charge, so long as such system does not connect an exchange with more than ten thousand telephones, shall not exceed six and twenty-five one-hundredths dollars ($6.25) per month; and that in no event shall said rent or charge exceed eight and twenty-five one-hundredths dollars ($8.25) per month for a telephone installed in any business office or premises for business purposes; and shall not exceed two and twenty-five one-hundredths dollars ($2.25) per month for a telephone installed in a private residence; Provided that a discount of twenty-five cents per month shall be made for cash payment on or before the tenth day of the month in which the service is rendered."

[fol. 241] That said ordinance is still in full force and effect and that it has been adjudicated by the Supreme Court of the State of Washington that said franchise constitutes a valid contract between The Home Telephone and Telegraph Company of Spokane, and the city of Spokane, and its inhabitants, save as it may be terminated by the Department of Public Works of the State of Washington, or by its predecessor in office, and that the said contract has never been terminated by the Public Service Commission of Washington or the Department of Public Works of Washington, save by an order permitting the putting into effect of those rates specified in Exhibit "A" attached to the bill of complaint herein and found on pages 18 and 19 thereof.

Alex. M. Winston.

Subscribed and sworn to before me this 27th day of April, 1923. H. F. Jones, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 242] IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION—Filed Apr. 30, 1923

This matter coming on for hearing before Hon. William B. Gilbert, Circuit Judge, and Hon. Edward E. Cushman and Hon. Jeremiah Neterer, District Judges, upon plaintiffs' application for an interlocutory injunction and the defendants' motion to dissolve the restraining order heretofore issued,

It is ordered that the restraining order be dissolved and that an interlocutory injunction be denied.

Opinion will be later filed.

Ordered, this 30th day of April, A. D. 1923.

Wm. B. Gilbert, Circuit Judge. Edward E. Cushman, District Judge. Jeremiah Neterer, District Judge.

[File endorsement omitted.]

[fol. 243] IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

DECISION ON APPLICATION FOR AN INTERLOCUTORY INJUNCTION—Filed May 23, 1923

[fol. 244] Before Hon. William B. Gilbert, United States Circuit Judge; Hon. Edward E. Cushman and Hon. Jeremiah Neterer, United States District Judges

OPINION

These causes are before the court upon applications for temporary injunctions under Section 266 of the Judicial Code (Section 1243 Compiled Statutes) and also upon defendants' motions to dissolve the restraining orders heretofore made.

The complaint in cause No. 166-E alleges that plaintiff operates a telephone and telegraph system in the State of Washington and elsewhere; that the defendants are officers of the State of Washington, as recited in the title hereto; that the order of the Department of Public Works of the State, prescribing maximum rates to be charged by plaintiff for its telephone service, is confiscatory and would deprive plaintiff of its porperty without due process of law; that, in Septem-

ber, 1922, plaintiff filed a schedule of rates, increasing its charges, which was suspended by the Department and an order made that plaintiff withdraw such schedule of rates filed and file a schedule conforming to its schedule in effect prior to the war period, which plaintiff did, save as to charges applicable to the Cities of Seattle and Tacoma; that numerous hearings were had by the Department for the purpose of determining the value of plaintiff's property and the reasonableness of its rates; that a ruling of the Department was made, one member dissenting, denying plaintiff's application for an in-
[fol. 245] crease in all respects. The dissenting member found the rates fixed, both toll and exchange, unreasonably low and found the rates filed by plaintiff in compliance with defendants' order to be reasonable.

It is averred that the cost of plaintiff's property in the state—exclusive of that furnishing telephone service to Spokane and adjacent territory (which latter is the subject of suit No. 167-E), was, on December 31, 1922, $29,347,254.00; that the cost of its Seattle property was $17,023,372.00; and the cost of its Tacoma property, $2,888,021.00; that the cost of such property has been increased since such date by additions and betterments; that the cost to plaintiff of its property was taken by the Department, substantially, as the rate base in fixing its charges in the order attacked; that the cost of reproduction as of the above date was, for the state, not including Spokane, $48,087,785.00; for Seattle, $27,149,130.00; and for Tacoma, $4,998,964.00; that the cost, less depreciation of such date, for the state was, $24,919,930.00; and for Tacoma, $4,534,264.00; that the fair and reasonable value of such property as of such date was: for the State, $35,616,896.00; for Seattle, $20,852,037; and for Tacoma, $3,457,290.00.

The complaint further alleges that:

"The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property."

Not less than eight per cent. upon the reasonable value is alleged to be a fair annual rate upon its business.

It is alleged that plaintiff's net return upon such property under the rates ordered for the years 1919, 1920, 1921, and 1922, based upon property cost, has ranged, for the state, from a maximum, in [fol. 246] 1919, of 4.97% to a minimum in 1922, of 3.17% for Seattle, from a maximum, in 1919, of 3.97%, to a minimum, in 1922, of .19%; and for Tacoma, from a maximum in 1919 of .98% to a minimum in 1921 of .58%. That its rate of return during such years, based upon the fair value of its property ranged, for the state, from a maximum in 1919, of 3.67%, to a minimum in 1921 and 1922, of 2.58%; for Seattle, from a maximum in 1919, of 2.66%, to a minimum, in 1922, of .15%; and for Tacoma from a maximum of .81% in 1919, to a minimum, in 1921 of .48%. That the net

revenue received for such years fell short of eight per cent. upon the cost of its property in varying amounts, ranging for the state from a maximum in 1922, of $1,310,651.00, to a minimum in 1919, of $537,242.00; for Seattle, from a maximum in 1922, of $1,192,580.00, to a minimum, in 1919, of $312,793.00; and for Tacoma, from a maximum in 1921, of $205,110.00, to a minimum, in 1919, of $187,587.00.

It is further alleged that, if the rates ordered are enforced and efficient service is maintained, it will result in the confiscation of plaintiff's property and prevent it from earning any return upon the fair and reasonable value of its property in the State in excess of 2.11% per annum; that .54% per annum loss would result upon the value of its Seattle property and .56% upon its Tacoma property.

It is alleged that, were the rates of the dissenting order in effect for 1923, plaintiff's return upon the fair and reasonable value of its property in the state would be 5.09%; for the City of Seattle, 2.81%, and for Tacoma, 3.96%; that, based upon the cost of its property, for the same period, plaintiff's rate would be, for the state, 6.15%; for the City of Seattle, 3.42%; and for the City of Tacoma, 4.73%; that [fol. 247] such *that such* last mentioned rates are unreasonably low; but that plaintiff proposes to put them in effect pending final decree and asks relief by way of an interlocutory injunction enabling it so to do.

In the above entitled cause, No. 167-E, involving the Spokane rates, alone, the complaint asks the same relief and, in so far as its allegations differ from the foregoing, avers:

That the cost of the property in the Spokane exchange (land being included at present value), was, on the 31st day of December, 1922, $4,266,899.00; that the cost at present is in excess of this amount; that the cost above given is the rate base used by the Department in the order attacked; that the cost of reproduction as of December 31, 1922, would be $8,039,784.00; that the cost of reproduction, less depreciation as of that date, would be $7,382,484.00; that the fair and reasonable value of the Spokane exchange property is $5,710,684.00. That plaintiff's net earnings for the years 1919, 1920, 1921 and 1922, calculated upon the cost of the property, give plaintiff an annual return ranging, from a maximum, in 1922, of 3.07%, to a minimum, in 1920, of 1.79%; that its net earnings for the same years, calculated on the fair value of its property, give returns ranging from a maximum, in 1922, of 2.28%, to a minimum, in 1920, of 1.30%. That for such years the net revenue failed to make a return of eight per cent. upon the cost, in amounts ranging from a minimum, in 1919, of $193,042.00, to a maximum, in 1920, of $237,883.00. That, if the Department's order is enforced, plaintiff would be prevented from earning, in 1923, any return in excess of 1.88% per [fol. 248] annum upon the fair and reasonable value of its property. That, if the order of the dissenting member of the Department—which plaintiff asks to have put in effect pending final decree—is enforced, plaintiff would earn, for such time, 5.52% upon the fair

value of its property, which would amount to but 7.64% upon its cost.

It is shown herein that the proceedings before the Department, resulting in the rate order attacked by the complaint, were instituted upon the complaint of the Department, after which the City of Seattle filed its supplemental complaint therein attacking plaintiff's then existing rates.

The Department held:

"that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington * * *.

"The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department."

The causes were consolidated for hearing by the Department. On December 14, 1922, the Washington Hotel Men's Association filed its complaint. Representatives of the Cities of Tacoma and Spokane took part in the hearing. These hearings resulted in the Department's order attacked herein by plaintiffs.

At the conclusion of a number of hearings, the Department found:

"Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the State of Washington, including the [fol. 249] Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company vs. Kuykendall, 119 Wash., 107.

* * * * * * *

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914 to June 30, 1922.

"In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph 'System.' Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma. * * *

"Finding

We find that the annual depreciation charge should be reduced from approximately 6% to 3½% for the period of two years from April 1st, 1923. * * *

"Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station. * * *

"In the case of the City of Houston vs. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-1922, No. 16, July 1, 1922, p. 539, is cited by respondents as supporting the contract but the opinion clearly states that the fact that one company owns stock in another 'requires close scrutiny of their [fol. 250] dealings to prevent imposition upon the community served by the company.'"

In Cause No. 166-E, the Attorney General has moved for a stay of this suit, pending the final determination of a suit brought in the Superior Court of Thurston County, ex rel. City of Seattle, on the ground that the latter suit is one to enforce the order sought to be enjoined herein.

Section 266 of the Judicial Code (Section 1243 Comp. Stats.), in part, provides:

"* * * It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the deter-

mination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith."

An examination of the record in the suit in Thurston County on the relation of the City of Seattle shows that this suit is one also attacking the rate ordered by the Department, and asks an even lower rate than that provided by the order for Seattle. It is shown that an order has been made by the Superior Court in such suit, in part, as follows:

"Ordered that the said respondents, E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission of Law,' and The Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the said hour of 10.30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted [fol. 251] as provided by law, and at said time this court may further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing, or attempting to file, new or other or alternative telephone tariffs and schedules of telephone rates in the premises."

The rates to be established for the state must be, to a certain extent at least, inter-dependent. Yet it would seem that the suit in the Superior Court, being brought on relation of the City of Seattle, would not, in the absence of intervention, necessarily be res judicata either of the rates throughout the state, or those of Tacoma or Spokane. Yet it is clear that the Department's course in holding that the questions involved could only be satisfactorily determined after "an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington" was entirely proper. This system and the rate to be fixed, based upon its ascertained value, are in the nature of a res. Therefore, while questions determined in the absence of interested parties, if any, may not strictly be res judicata, yet under the necessities of the case, all the rights and duties of all interested would necessarily be considered and found, if not determined.

The foregoing consideration, coupled with the fact that the suit brought in the Superior Court is not one to enforce the rate order attacked by plaintiffs, but is, itself, one making an attack thereon, renders the proviso of Section 266 of the Judicial Code not strictly

applicable. It does not follow, however, that consideration of the institution of such suit is to be ignored, or that it is without effect. This matter will be later considered.

By sections 10424 and 10431, Remington's Compiled Statutes 1922, it is provided:

[fol. 252] "Sec. 10424. Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective; Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court." (Laws of 1915, p. 362, Sec. 1. Cf. Laws of 1911, p. 594, sec. 82.)

"Sec. 10431. Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint,

and such orders may be reviewed as are other orders of the com-
[fol. 253] mission: Provided, that no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided. The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission." (Laws of 1911, p. 599, sec. 89.)

It has been contended upon the part of the defendants that the present suit has been prematurely begun because no petition for a re-hearing has been presented by plaintiffs to the Department of Public Works—which is the successor of the Public Service Commission (Remington's Compiled Statutes section 10784)—asking for a re-consideration of its rate order.

In view of the discretionary character of proceedings upon rehearing and the provision made in the sections quoted denying the right of supersedeas—which latter, while expressly only made applicable to the court's review of the Department's order, it may be assumed, would, in its discretion, be adopted by the Department—it is concluded that the suits have not been prematurely begun upon this ground.

William A. Prendergast, et al. vs. New York Telephone Company (Decided by U. S. Sup. Ct. Apr. 16, 1923).

It was stated upon the argument of the application for a preliminary injunction that, after service of the restraining order, plaintiffs had filed the schedule of rates directed in the order, being those asked pending final determination of the suit. Defendants contend that this constituted an abandonment by plaintiffs of the rate schedules involved in the Department's hearings and findings. The court concludes that such filing was but a step taken by plain-
[fol. 254] tiffs in rendering affective the restraining order and that its result was not to render the issues involved in those suits merely moot questions.

It has been further suggested that these suits have been prematurely begun because plaintiffs did not, prior to their institution, seek a review of the Department's order by the State court. Sections 10428 and 10429 Remington Compiled Statutes provide:

"Sec. 10428. Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and

after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Laws of 1911, p. 596, sec. 86.)

It will be noted from the foregoing section that, upon review, the court may only render judgment either affirming or setting aside the order of the Commission, unless the court should hold that the language of this section:

"The court may, in its discretion, remand any cause which is reversed by it to the commission for further action."

gives the court a wider discretion. Unless it is so held, the court is given no power by that section to make its own findings, or fix rates. For this reason, as far as this statute is concerned, the suit has not [fol. 255] been begun prematurely. (Bacon v. Rutland R. R. Co., 232 U. S., 134, at 137.)

The plaintiff, The Pacific Telephone and Telegraph Company (Cause No. 166-E), in describing the hearings had by the Department resulting in its order attacked herein alleges:

"That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said estate; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. * * * That the cost to plaintiff of its property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma

is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time."

Similar allegations are contained in the complaint in cause No. 167-E.

The outline above of the complaints in the two suits shows that there is involved a controversy as to the value of the properties; that is, the determination of the rate base.

Section 10441 Remington's Compiled Statutes (which is described in one of its titles as appearing in the 1913 session laws of the State: "Valuation of Public Service Properties as Fixed for Rate Purposes. Not to be Used for Taxing Purposes") provides:

"The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of con- [fol. 256] struction, and the cost of reproducing in its present condition the property of every public service company. * * *

"The commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

"The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

"All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

"The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

"Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted, or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined.

Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

"Said public service company or the commission shall have the [fol. 257] right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered, in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts herein determined.

"The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively,

and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings; Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing." (Laws of 1911, p. 601, sec. 92; Laws 1913, p. 662, sec. 1).

[fol. 258] Section 10429 Remington's Compiled Statutes provides:

"The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

"No order so restraining or suspending an order of the commission relating to rates, fares, charges, tolls or rentals, or rules or regulations, practices, classifications or contracts affecting the same shall be made by the superior court otherwise than upon three days' notice and after hearing, and if a supersedeas is granted the order granting the same shall contain a specific finding, based upon evidence submitted to the court making the order, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage; Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court by such supreme court.

"In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioning for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended.

"The court may, in addition to or in lieu of the bond herein provided for, require such other or further security for the payment of such excess charges or damage as it may deem proper." (Laws of 1911, p. 597, sec. 87).

The findings of the Department show that its hearings and findings were made in pursuance of section 10441 above.

It clearly appears from the foregoing that, upon a review of the Department's proceedings, neither the Superior nor the Supreme

Court is limited to a judgment of affirmance or reversal; but that the Superior court may

"In case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, [fol. 259] shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

and that

"In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

It thus clearly appears that both courts have legislative authority in determining the rate base, superior to that of the Department.

Considerations of "comunity and convenience" require the court to hold that, until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed.

Prentis vs. Atlantic Coast Line, 211 U. S., 210;
The Public Utilities Commission of the District of Columbia vs. Potomac Electric Power Company, et al., (Decided by U. S. Sup. Ct. Apr. 9, 1923)
William A. Prendergast et al. vs. New York Telephone Company, (Decided by U. S. Sup. Ct. Apr. 16, 1923)
Bacon v. Rutland R. R. Co., 232 U. S., 134.

Granted the power, it is not practicable for the Department, the State or Cities to indemnify the plaintiffs in these cases, should [fol. 260] plaintiffs in the end prevail and establish the right to higher rates. The reason that it is impracticable is on account of the inconvenience and disproportionate cost to the Department, State and Cities in securing indemnity from each of the telephone users against the contingency of the higher rates being determined in the end the proper rates. It is obvious, on account of changes in those making use of the service furnished by the plaintiffs and the small amounts involved in the individual transactions that it is unreasonable to ask them to look to such users for such indemnity should they ultimately prevail. It is, therefore, clear that—should

the showing made establish with reasonable certainty the confiscatory nature of the rates ordered—plaintiffs, upon giving an adequate bond for the protection of those concerned, in case plaintiffs fail to establish their contention, are entitled to have the objectionable rates stayed pending final determination.

The extent of the stay in the Thurston County case is not made clear. It will be assumed that it does not stay the enforcement of the rate attacked by plaintiffs. While the Thurston County case is not one brought to "enforce" the Department's "order," it is one seeking a lower rate than that of such order and, therefore, puts the Department to the defense of the order which plaintiffs here attack in cause No. 166-E.

The Pacific Telephone and Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff herein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Wash-
[fol. 261] ington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.

Prentis v. Atlantic Coast Line, 211 U. S., 210;
Bacon v. Rutland R. R. Co., 232 U. S., 134 at 137;
Oklahoma Natural Gas Co. vs. Campbell Russell, et al., (Decided by Sup. Ct. of U. S. Mar. 5, 1923)

The same considerations which require that the preliminary injunction be denied, necessitate the dissolution of the restraining order. Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered.

Judge William B. Gilbert, concurs.

Judge Jeremiah Neterer, concurring, states:

[fol. 262] IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

CONCURRING OPINION—Filed May 23, 1923

NETERER, D. J.: I agree with the conclusion of Judge Cushman that on consideration of comity and convenience this court should not interfere where the plaintiff has open a higher court of the state, The Prentis Case, 211 U. S., 210; Puget Sound Elec. Ry. Co. v. Lee, 207 Fed. 501, until the State remedy is exhausted. The plaintiff by its acts has become an adopted creature of the State, enjoying

the rights and privileges provided by its law, and is subject to the control thereof. The State accords it a right of eminent domain, and it becomes amenable to the Washington Public Service Commission Law. This law provides for establishing reasonable rates for public service. Provision is made for hearing and finding, and for review, Rem. C. 10428, before the Superior Court and for appeal to the Supreme Court from such judgment, R. C. 10430.

This court has jurisdiction by reason of the Fifth and Fourteenth amendments only. It has no revisory power and may not amend or modify a rate in the chancery sense, but is confined to the judicial determination of the controversy on the facts, and may not enter the administrative or legislative issue, Public Utilities, etc. v. Potomac Elec. Power Co. U. S. Supreme Court, April 9, 1923. I also desire to say that in my opinion the majority of the Commission have the right conception that consideration should be given to the $2,500,000. (round numbers) in the depreciation surplus fund, and adjusted compensation for the 4½ per cent contract with the Parent Company. Whether the proper consideration was given is not now before the court.

(Signed) Jeremiah Neterer.

[File endorsement omitted.]

[fol. 263] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Assignment of Errors—Filed July 16, 1923

Comes now The Home Telephone and Telegraph Company of Spokane, a corporation, plaintiff in the above entitled cause, and files the following Assignments of Error on which it will rely on its appeal from the interlocutory order entered in the above entitled cause on the 30th day of April, 1923:

I. The court erred in denying plaintiff's motion for an interlocutory injunction.

II. The court erred in not granting the motion of said The Home Telephone and Telegraph Company of Spokane for an interlocutory [fol. 264] injunction.

III. The court erred in refusing to hold that the order of the Department of Public Works of Washington, rendered March 31, 1923, deprives plaintiff of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV. The court erred in holding that if the order of the Department of Public Works of Washington, rendered March 31, 1923, de-

prives plaintiff of its property without due process of law, nevertheless the above entitled suit should be stayed until said The Home Telephone and Telegraph Company of Spokane has applied to the State courts of Washington for relief against the enforcement of said order and such relief has been refused by said State courts.

V. The court erred in holding that the order of the Department of Public Works of Washington, rendered March 31, 1923, was not the final legislative act under the laws of the State of Washington.

VI. The court erred in holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is not, in so far as it purports to confer legislative power upon the courts of the State of Washington, in violation of and contrary to Article II, Section 1, and Article IV, Section 1, of the Constitution of the State of Washington.

[fol. 265] VII. The court erred in holding that the pendency of a certain cause in the Superior Court of the State of Washington for Thurston County, entitled: "The State of Washington, ex rel. The City of Seattle, a municipal corporation, Petitioner and Relator, v. E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington, exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission Law;' and The Pacific Telephone and Telegraph Company, a corporation, Respondents," requires that this suit pending in the United States District Court for the Western District of Washington, Southern Division, be stayed.

VIII. The court erred in not holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States so far as said Chapter 182 precludes a determination of the value of the property of the above named plaintiff as of the time when an inquiry was made by the Department of Public Works of the State of Washington in 1923 regarding rates.

Wherefore, in order that the foregoing Assignment of Errors may be and appear of record, plaintiff presents the same to the court and prays that such disposition may be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided; and plaintiff prays that said interlocutory order of [fol. 266] April 30, 1923, be reversed, set aside and held for naught, and that an order granting plaintiff's motion for an interlocutory injunction be entered by the court.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 267] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed July 16, 1923

The above named, The Home Telephone and Telegraph Company of Spokane, feeling itself aggrieved by the order rendered in the above entitled cause on the 30th day of April, 1923, denying the motion of said The Home Telephone and Telegraph Company of Spokane for an interlocutory injunction in said cause, does hereby appeal from said order to the Supreme Court of the United States, and prays that this, its appeal, may be allowed and that a transcript of the record and proceedings in said cause, and all things concerning the same, upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herein filed by [fol. 268] said The Home Telephone and Telegraph Company of Spokane, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Petitioner. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 269] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 16, 1923

It is hereby ordered, that the appeal prayed for by the above named plaintiff in the above entitled cause, to the Supreme Court of the United States, be and the same hereby is allowed as prayed.

Done in open court this 16th day of July, 1923.

Edward E. Cushman.

[File endorsement omitted.]

[fol. 270] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER FIXING AMOUNT OF BOND ON APPEAL

On reading the petition of the above named plaintiff in the above entitled cause, for the allowance of an appeal to the Supreme Court of the United States from the order rendered in said cause on April 30, 1923, denying the motion of plaintiff for an interlocutory injunction in said cause, it is ordered that the plaintiff above named execute and file in the office of the Clerk of the above entitled court a bond on appeal conditioned according to law, in the sum of Five Hundred & no/100 Dollars, with good and sufficient surety to be approved by the undersigned.

Done in open court this 16th day of July, 1923.

Edward E. Cushman, Judge.

[fol. 271] [File endorsement omitted.]

[fols. 272 & 273] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

BOND ON APPEAL FOR $500.00—Approved and filed July 16, 1923; omitted in printing

[fol. 274] [File endorsement omitted.]

[fol. 275] [Title omitted]

CITATION—Filed July 16, 1923; omitted in printing

[fol. 276] Due and proper service of the above and foregoing Citation is hereby accepted and acknowledged this 17 day of July, 1923.

John H. Dunbar, Raymond W. Clifford, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 277] [Title omitted]

ACCEPTANCE OF SERVICE

Due, regular and timely service of the Citation on Appeal in the above entitled cause, from the United States District Court for the Western District of Washington, Southern Division, to the Supreme Court of the United States, of the Præcipe for Record on Appeal in said cause, of the Petition for Allowance of Appeal, of the Order Allowing Appeal, of the Assignment of Errors, of the Order Fixing Amount of Bond on Appeal and of the Appeal Bond in said cause, is hereby admitted this 17 day of July, 1923.

John H. Dunbar, Raymond W. Clifford, Solicitors for Defendants.

[fol. 278] [File endorsement omitted.]

[fol. 279] [Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed July 17, 1923

To the Clerk of the above entitled court:

Please make and certify on appeal to the Supreme Court of the United States, a record which includes the following files, to-wit:

1. Bill of Complaint and Exhibits;

2. Subpœna and Marshal's return thereto;

3. Temporary restraining order;

4. Affidavits of C. T. Blanck, C. S. Cassassa, P. H. Coolidge, C. E. Fleager (3 thereof), Henry L. Gray, L. Lewis Rutter, J. C. Nowell, W. J. Phillips, offered in evidence by plaintiff in support [fol. 280] of its application for an interlocutory injunction;

5. Motion of defendants to dismiss plaintiff's complaint;

6. Motion of defendants to dissolve restraining order, together with affidavit thereto attached;

7. Affidavit of Alex M. Winston filed in opposition to application for interlocutory injunction;

8. Order of April 30, 1923, denying interlocutory injunction;

9. Opinion filed May 23, 1923, on application for interlocutory injunction;

10. Assignment of Errors;

11. Petition for Allowance of Appeal;

12. Order allowing Appeal;

13. Order fixing Amount of Bond on Appeal;

14. Bond on Appeal;

15. Citation;

16. Acceptance of service;

17. This præcipe with acceptance of service thereof.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, of Counsel.

[File endorsement omitted.]

[fol. 281] UNITED STATES OF AMERICA,
Western District of Washington, ss:

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the District Court of the United States of America, for the Western District of Washington, do hereby certify and return to the claim of appeal of The Home Telephone and Telegraph Company of Spokane from a certain order dated April 30, 1923, in a cause pending in said court wherein The Home Telephone and Telegraph Company of Spokane, a corporation, is plaintiff, and E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and John H. Dunbar, Attorney General of the State of Washington, are defendants, that the above and foregoing and within transcript of record, pages numbered 1 to 282 inclusive, is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

I further certify that I hereto attach and herewith transmit the original citation in said cause with acceptance of service on said writ.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of appellant herein, for making record, certificate and return to the Supreme Court of the United States in the above entitled cause to-wit:

[fol. 282] Filing appeal papers, orders, etc., and issuing citation $7.00
Clerk's Fees (Sec. 828 R. S. U. S.) for making record, certificate and return, 596 folios at 15¢..... 89.40
Certificate of Clerk to record, 4 folios at 15¢, and seal..... .80

Total $97.20

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Tacoma, in said District this 28th day of August, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, By Ed. M. Lakin, Deputy. (Seal of the United States District Court Western District of Washington.)

[fol. 283 & 284] CITATION AND SERVICE—Filed July 16, 1923; omitted in printing

[fol. 285] [File endorsement omitted.]

Endorsed on cover: File No. 29,849. Western Washington D. C. U. S. Term No. 539. The Home Telephone and Telegraph Company of Spokane, appellant, vs. E. V. Kuykendall, as Director of Public Works of Washington, et al., etc., et al. Filed September 10, 1923. File No. 29,849.

No. 539

FILED
NOV 30 1923
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellant,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION

Motion to Advance

H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Counsel for Appellant.

Law Brief Printing Co., Seattle

No.————

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,

Appellant,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION

Notice

To:

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.
Counsel for Appellees.

PLEASE TAKE NOTICE that on Monday, December 3, 1923, at 12:00 o'clock noon, or as soon there-

after as counsel may be heard, The Home Telephone and Telegraph Company of Spokane, a corporation, appellant, will submit to the Supreme Court of the United States, a motion, a copy of which is attached hereto, petitioning said Court to advance the above entitled cause for hearing.

Dated November 19, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE.

By H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Its Counsel.

No.————

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Appellant,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION

Motion to Advance

The Home Telephone and Telegraph Company of Spokane, a corporation, appellant above named, moves that this case be advanced for hearing in the October Term, 1923, of this court, and in support of said motion, respectfully shows to the court:

Appellant is engaged in the telephone business and in furnishing telephone service to the public in the City of Spokane, Washington.

The Department of Public Works of Washington is the regulatory body of that state, having power to regulate appellant's telephone rates therein.

On March 31, 1923, the Department of Public Works entered an order prescribing the rates for telephone service to be charged by appellant in the City of Spokane, Washington. Thereupon and on April 24, 1923, this suit was instituted in the United States District Court for the Western District of Washington, Southern Division, to enjoin the enforcement of said order temporarily and permanently on the ground that it would confiscate appellant's property. On April 30, 1923, appellant's application for an interlocutory injunction was denied by the statutory court of three judges, convened as provided for in Section 266 of the Judicial Code.

Appeal was taken from that order to this court and is now pending, and appellant prays to have it advanced for hearing.

In support of this motion to advance, appellant shows the following grounds:

1. The statutory court declined to consider appellant's application for an interlocutory injunction on the merits, but denied the application unless and until appellant should apply to the state court for a stay or supersedeas staying the enforcement of the rate order and until the application so made in the state court should be denied by the Supreme Court of the State of Washington. The identical questions presented to this court upon the pending appeal were decided in accordance with appellant's contentions here by the United States Circuit Court of Appeals for the Ninth Circuit on October 17, 1923, in a case involving another aspect of the companion case of The Pacific Telephone and Telegraph Company, a corporation, Appellant, vs. E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, appellees, hereinafter referred to. The opinion of that court, not yet officially reported, is attached hereto as Appendix "A" and made a part of this motion.

2. Appellant alleges and shows by its bill of complaint and affidavits, which were before the statutory court upon the hearing of the application for an interlocutory injunction, that the enforcement of the rate order complained of will prevent it from earning any return in excess of 1.88% per annum upon the fair value of its property in the City of Spokane, and that appellant is suffering daily, and will continue to suffer, a loss in excess of $700.00 a day by reason thereof, or, in other words, a deficiency of more than $700.00 a day below a fair return upon the fair value of the property. Appellant has upwards of 22,000 subscribers in the City of Spokane, and, as the amount of the monthly charges to each subscriber and patron is very small, the appellant will have no means of collecting the additional sums to which it is entitled, if an interlocutory injunction is delayed, but finally granted.

3. Appellant is advised by the clerk of this court that the pending appeal will not be set down for hearing in ordinary course until the October Term, 1924, of this court. If the appellant is entitled to an interlocutory injunction (a question which the statutory court has refused to consider upon the merits), appellant will suffer a loss of more than $700.00 a day in the interim.

(This is a companion case of a suit pending in this court on appeal, entitled "The Pacific Telephone and Telegraph Company, Appellant, vs. E. V. Kuykendall et al., Appellees," motion to advance which is contemporaneously submitted, and the memorandum in support of such motion applies here, except in respect to figures concerning the number of telephone subscribers and the losses.)

WHEREFORE, appellant prays that the cause be advanced and set down for argument at the earliest day convenient to the court and consistent with its rules.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE.

By H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Its Counsel.

Appendix "A"

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT

No. 4070

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation), *Petitioner*

vs.

HONORABLE EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division

Before Hunt and Rudkin, Circuit Judges, and Bourquin, District Judge

RUDKIN, Circuit Judge:

This is an application for a writ of mandamus. The facts, so far as deemed material, are these: The petitioner is a public service corporation engaged in a general telephone and telegraph business in the state of Washington and elsewhere. On the 8th day of August, 1919, the Public Service Com-

mission of that state made an order prescribing maximum rates to be charged for exchange and toll service within the state. The rates thus established are still in force. On the 22d day of September, 1922, the petitioner filed a new schedule advancing the rates, or at least some of the rates, thus established, but the Department of Public Works successor in authority to the Public Service Commission, suspended the operation of the new rates until a hearing could be had. After such hearing on the 13th day of March, 1923, the application for an increase of rates was denied. Thereupon a bill was filed in the court below against the Attorney General of the state and the members of the Department of Public Works to restrain them from enforcing the existing rates on the ground that such rates were confiscatory and deprived the petitioner of its property without due process of law. An application for an interlocutory injunction was heard by three judges, pursuant to section 266 of the Judicial Code. The application was denied and an appeal was prosecuted from that order to the Supreme Court of the United States. The court, consisting of three judges, refused to hear the application for an interlocutory injunction until the petitioner should apply to the state

courts for a stay or supersedeas in certain proceedings instituted in those courts, after the filing of the bill in the court below and until such stay or supersedeas was refused by the state courts. Thereafter the petitioner called up the motion to dismiss the bill of complaint interposed by the defendants, but the court below refused to consider the same or to proceed further with the hearing or trial for the reasons theretofore stated by the three judges, namely, until the petitioner should apply to the state courts for a stay of proceedings and until such stay was refused by these courts. The present application was thereupon presented to this court for a rule to show cause why a writ of mandamus should not issue to compel the court below to proceed with the hearing and trial of the cause.

If the court below has wrongfully refused to proceed with the trial, the power of this court to issue a writ of mandamus in aid of its appellate jurisdiction would seem to be beyond question. The stay order is not final or appealable, and the cause can never reach this court by appeal or otherwise, until the court below proceeds to final judgment. In other words, there is no other adequate remedy. Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945. The ruling below was based largely upon the case of Prentis v. Atlantic Coast Line, 211 U. S. 210. That

case arose in the State of Virginia, where rates established by the state corporation commission are subject to review by the Supreme Court of Appeals of the state, and where upon appeal the court, under the constitution, exercises legislative power, and is authorized to substitute other rates for those established by the commission. In view of the power thus vested in the Supreme Court of Appeals, and in view of the further fact that there had been no present invasion of the rights of the companies, the supreme court deemed it the more proper and orderly course to await the result of the appeals to the state court if the companies saw fit to take them. But this decision has been explained, if not limited, by more recent decisions of the same court. Thus in Bacon v. Ruthland R. R. Co., 232 U. S. 134, a bill was filed in the federal court to restrain the Public Service Commission of the State of Vermont from enforcing an order concerning a passenger station. The commission moved to dismiss the bill on the ground that the court should not consider it until the company had prosecuted an appeal to the supreme court of the state as permitted and authorized by law. But in answer to this contention the supreme court said:

"The defendants rely upon Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 229, 230. The ground

of that decision was that by the state constitution an appeal to the Supreme Court of Appeals from an order of the State Corporation Commission fixing rates was granted, with power to the court to substitute such order as in its opinion the commission should have made. The court was given legislative powers, and it was held that in the circumstances it was proper, before resorting to the Circuit Court of the United States, to make sure that the officials of the state would try to establish an unconstitutional rule. But it was laid down expressly that at the judicial stage the railroads had a right to resort to the court of the United States at once. (p. 228.) Therefore, before that case can apply it must be established at least that legislative powers are conferred upon the Supreme Court of the State of Vermont."

The court then held that the Supreme Court of the State of Vermont was vested with no legislative power, and affirmed the decree granting an interlocutory injunction. A similar question arose in Oklahoma Gas Co. v. Russell, 261 U. S. 290. The Supreme Court of Oklahoma, like the Supreme Court of Appeals of Virginia, exercises legislative power on appeals from the Corporation Commission in rate cases. There the rate was already in effect; an appeal had been prosecuted to the supreme court of the state, and that court had refused a supersedeas, which it was authorized to grant. Under these circumstances the supreme court said:

"Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for the present purposes, they are suffering daily from confiscation under the rate to which they are now limited. They have done all that they can under the state law to get relief and cannot get it. If the supreme court of the state hereafter shall change the rate, even *nunc pro tunc*, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. Springfield Gas & Electric Co. v. Barker, 231 Fed. 331, 335. In such a state of facts Prentis v. Atlantic Coast Line Co., has no application. See Love v. Atchison, Topeka & Santa Fe Ry. Co., 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the circuit court but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. 211 U. S. 232. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state."

It will thus be seen that the *Prentis* case has no application here, unless the Supreme Court of the State of Washington is vested with legislative power in this class of cases. Furthermore, it has

no application unless the state courts are authorized to grant a supersedeas.

Where, as in the State of Washington, there is a distinct division of the powers of government between the different branches or departments, the rule is general, if not uniform, that there can be no delegation of legislative power to the judicial tribunals of the state. In view of the fact that this rule that been adhered to by the supreme court of that state, it is needless to cite authorities from other jurisdictions. Thus in the early case of Territory ex rel Kelly v. Stewart, 1 Wash. 98, 110, the court said:

"We hold that a judicial court cannot exercise legislative functions, and that the legislature can not impose such power upon it."

To the same effect see Selde v. Lincoln County, 25 Wash. 198; In re Bruen, 102 Wash. 472. If it be claimed that the court has departed from that rule to some extent in other cases we can only quote the language of the supreme court in Det. Mackinac Ry. Co. v. Mich. R. R. Comm., 235 U. S. 402:

"But the constitution of Michigan, Art. II, separates legislative, executive and judicial powers, and so plainly forbids conferring those given by the Virginia Constitution to the Virginia Supreme Court of Appeals, that in the absence of a clear decision

by the state court we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan."

See, also, Oregon R. R. & Nav. Co. v. Campbell, 173 Fed. 957; Helena Water Co. v. City of Helena, 277 Fed. 66.

It therefore appears that this case had reached the judicial state, as defined by the supreme court in the Ruthland Railroad Company case, when the bill was filed in the court below. The petitioner had a right, therefore, to invoke the jurisdiction of the federal court, and it was the duty of that court to hear its complaint and grant such relief as it was entitled to in the premises.

Again, if the petitioner was denied a supersedeas by the state or by the state courts, the rule announced in the Oklahoma Gas Co. case applies, and in this connection it is immaterial whether the supersedeas was denied by the court or by the supreme legislative authority of the state. Section 10429 of Remington's Compiled Statutes, 1922, provides:

"That when any rate has been in force for any length of time exceeding one year and such rate is advanced by the Public Service Company, and the order of the commission reinstates such prior rate in whole or in part, no supersedeas shall be al-

lowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

Here the rate had been in force for more than one year; the rate was advanced by the Public Service Company and the Department of Public Works had reinstated the prior rate. Under such circumstances the law expressly declares that no supersedeas shall be allowed by any court pending the final determination of the case. But it has been mildly suggested that this provision of the law may be declared unconstitutional by the supreme court of the state, or that the courts of the state might grant a supersedeas, notwithstanding the prohibition contained in the statute. We are not permitted to indulge in any such speculation where important constitutional rights are involved. No ground of unconstitutionality has been suggested; the presumption is to the contrary, and in this case we think the presumption accords with the fact. In the exercise of appellate jurisdiction conferred by the constitution it may be that the supreme court of the state has inherent power to grant a supersedeas to the end that its appellate jurisdiction may not be defeated; but however that may be, where, as here, the appeal is wholly statutory jurisdiction

may be conferred or withheld at the pleasure of the legislature.

We are therefore of opinion that the stay of proceedings was unauthorized, and the reasons assigned therefor unsound. But it is said that the court below was bound by the reasons assigned by the three judges. This conclusion does not follow. With the granting or refusing of an interlocutory injunction the district judge sitting alone and this court have no concern; but with the trial upon the merits the court consisting of three judges had no concern. If the petitioner is entitled to have the case heard on its merits it is no answer to say that the three judges refused to hear the application for an interlocutory injunction until some unauthorized condition precedent had been complied with. To hear the application for an interlocutory injunction was the function of the court consisting of three judges, but to hear the case on the merits was the sole function of the district court consisting of a single judge. Again, it is suggested that the appeal from the order denying the interlocutory injunction stayed proceedings in the court below. This was not one of the reasons assigned by the trial judge for refusing to proceed, and perhaps we should not consider it. But in any event, the rule is well

settled, independent of statute, that an appeal from an interlocutory order such as this does not stay proceedings in the main case. Elliott on Appellate Procedure, section 542.

For the reasons here stated the writ must issue as prayer, and

IT IS SO ORDERED.

(Endorsed) Opinion, Filed Oct. 17, 1923.

F. D. MONCKTON, Clerk,
By PAUL P. O'BRIEN, Deputy Clerk.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

No.....

PETITION IN ANSWER TO MOTION TO ADVANCE

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

Counsel for Appellees.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

No.....

NOTICE

To—

H. D. PILLSBURY, ESQ.,
FRANK T. POST, ESQ.,
W. V. TANNER, ESQ.,
Counsel for Appellant.

PLEASE TAKE NOTICE that on Monday, December 3, 1923, at 12 o'clock noon, or as soon thereafter as counsel may be heard, E. V. Kuykendall, as Director of Public Works of Washington, Hance

H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and John H. Dunbar, the Attorney General of the State of Washington, Appellees, will submit to the Supreme Court of the United States a petition in answer to motion to advance, a copy of which is attached hereto, petitioning said court to pass said motion to advance for consideration until the determination of the petition for certiorari in the case of Honorable Edward E. Cushman, District Judge of the United States for the Western District of Washington, Southern Division, Petitioner, v. The Pacific Telephone and Telegraph Company, Respondent.

Dated November 24, 1923.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington,
Appellees.

By JOHN H. DUNBAR, Attorney General of the State of Washington, and RAYMOND W. CLIFFORD, Assistant Attorney General of the State of Washington, *Their Counsel.*

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

No.....

PETITION IN ANSWER TO MOTION TO ADVANCE

The petitioners are appellees herein; with the exception of the appellee Dunbar, they constitute the Department of Public Works of the State of Washington, a regulatory body of that State having jurisdiction over the rates which are the subject of this suit. The exchange rates, a denial of increase in which gave rise to this suit, are the war time rates

made effective by the Postmaster General while he was in possession and control of the system of appellant by authority of a resolution of Congress and a proclamation of the President. They were refiled by appellant at the termination of Federal control and continued in effect immediately upon such termination by affirmative order of the State regulatory body. The toll rates of the appellant are also the war time rates of the Postmaster General.

On application for an interlocutory injunction herein, the court of three judges, constituted as provided in section 266, Judicial Code, held that it was lacking in jurisdiction until a resort to and exhaustion of the remedies provided by State law (cf. Motion to Advance, p. 4). An appeal was thereafter taken from the order of the three-judge court denying an interlocutory injunction, the advancement of which appeal the appellant now moves. Appellees made prompt appearance in this court on such appeal.

This suit is a companion case to a suit pending in this court on appeal, entitled "The Pacific Telephone and Telegraph Company, Appellant, v. E. V. Kuykendall, et al., Appellees." In the Pacific Telephone and Telegraph Company case the appellant therein took certain steps in the District and Circuit Court of Appeals terminating in the issuance by the Circuit Court of Appeals of a peremptory writ of mandamus addressed to the District Court requiring such court to proceed to hear and dispose of the

defendants' motion to dismiss, from which order of the Circuit Court of Appeals Hon. Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, the respondent therein is applying to this court for a writ of certiorari. The proceedings relative to such mandamus action in the Pacific case and the certiorari therefrom are fully set forth in the petition in answer to motion to advance filed by appellees in that suit and the statements therein made and the affidavit therein contained apply herein in the manner hereinafter set forth. From the motion filed by appellees in that suit, it will be seen that the petition for certiorari therein will be noted for hearing before this court on January 7, 1924.

Appellees pray that the motion to advance be passed for consideration until the determination of the petition for certiorari in the mandamus proceeding in connection with the companion case of the Pacific Telephone and Telegraph Company, Appellant, v. E. V. Kuykendall, et al., and that upon the granting of such petition the instant proceeding and that by way of certiorari in the companion case, be consolidated.

This petition is not made for the purpose of delay, but is of right by reason of the following:

1. The determination of the certiorari proceedings in the companion suit will establish the law governing this suit, the allowance of certiorari and consequent stay of proceedings before the trial court

will establish the rule to be followed by the trial court in this suit.

2. The appellant contends (Motion to Advance, p. 5) that the Circuit Court of Appeals in the companion suit, decided in the mandamus proceeding therein, the identical questions that are before this court upon the present appeal. Conceding this for argument only and not admitting the same, appellees are entitled to stay by certiorari in that proceeding to litigate the rule requiring procedure with the merits where trial may be for naught, which rule in that suit will also control procedure in this suit.

3. The showing denying fair return as set forth by appellant in its bill and affidavits filed for hearing before the statutory court, was controverted by the affidavit of appellee Kuykendall. It was shown, *inter alia*, that depreciation expense claimed was excessive and, in part, not properly allowable, and the expense of alleged services and materials said to be furnished by the parent concern of appellant, far greater than a reasonable expense for such services and materials as were in fact furnished. The Statutory Court, examining the bill with respect to jurisdiction, found that issues involving valuation were presented.

4. It was contended on behalf of Judge Cushman in the mandamus proceeding in the companion suit that the jurisdictional defect disclosed by the bill in that case, and found by the Statutory Court (which is also true of the instant case), was an im-

pediment alike to the application for an interlocutory injunction and the prosecution of the merits. On the other hand, appellant contended that the jurisdictional defect extended only to the interlocutory application. It is plain that if the instant appeal is determined in accordance with appellant's contention restricting the jurisdictional issue, the statutory court being nevertheless sustained with respect to the existence of such jurisdictional defect and without the allowance and consolidation of the proceeding by way of certiorari, appellees will be compelled to meet on trial the issues raised by the prayer for permanent injunction, notwithstanding.

WHEREFORE, appellees pray that the motion to advance be passed for consideration until the determination of the petition for certiorari in the mandamus proceeding in the companion suit, and that upon the granting of such petition the instant proceeding and that by way of certiorari be consolidated.

E. V. KUYKENDALL,
as Director,

HANCE H. CLELAND and

FRANK R. SPINNING,
as Supervisors of the Department of Public Works of the State of Washington.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

Appellees,

By JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

Counsel for Appellees.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Appellant,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Appellees.

No. 539

MOTION TO DISMISS

JOHN H. DUNBAR,
Attorney General of the State of Washington.

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington.

H. C. BRODIE,
Counsel for Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*, v. E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees*.	No. 539

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the within Notice, Motion to Dismiss, Statement and Argument is hereby admitted by the undersigned at Seattle, Washington, this 11th day of February, 1924.

C. M. BRACELEN,
OTTO B. RUPP,
H. D. PILLSBURY,
FRANK T. POST,
W. V. TANNER,
Counsel for Appellant.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees*.
No. 539

NOTICE

TO THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, Appellant, and to C. M. BRACELEN, OTTO B. RUPP, H. D. PILLSBURY, FRANK T. POST and W. V. TANNER, counsel for appellant:

Please take notice that on Monday, March 24, 1924, at 12 o'clock, noon, or as soon thereafter as counsel may be heard, the appellees herein will submit to the consideration of the court their motion to dismiss, copy of which is attached.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1923

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,
v.
E. V. KUYKENDALL, as Director of Public Works of Washington, *et al.*, *Appellees*.
No. 539

MOTION TO DISMISS

Now come the appellees herein and move the court to dismiss the appeal from an order denying an interlocutory injunction herein upon the following grounds:

I.

That this court will not review the order denying an interlocutory injunction for the reason that the question of relief *pendente lite* has become moot by dismissal of the complaint therein.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

STATEMENT.

For the purpose of the motion hereinbefore set out, the facts involved may be stated as follows:

The Home Telephone and Telegraph Company of Spokane, on the 24th day of April, 1923, filed in the district court of the United States, for the western district of Washington, southern division, its bill of complaint against the appellees herein. In said complaint, in addition to other matters, the appellants prayed for a temporary injunction to restrain the appellees herein from enforcing a certain rate order of the department of public works of the state of Washington. On April 30, 1923, the application of the appellant for an interlocutory injunction came on to be heard before the statutory court of three judges provided for in section 266 of the Judicial Code, and said application was denied, and from said order this appeal was prosecuted to this court.

Thereafter such proceedings were had in said case in the district court as resulted in the entry of an order dismissing the bill of complaint therein by the said court on the 5th day of January, 1924. From said order of dismissal, an appeal has been taken to this court and is now pending herein as cause No. ..... The transcript of record in said appeal from said final order has not yet been printed, but for the information of the court in passing on this motion, said order of dismissal is set forth in full as follows:

In the District Court of the United States, for the Western District of Washington

SOUTHERN DIVISION

IN EQUITY, No. 167-E

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation,
Plaintiff,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington.
Defendants.

DECREE

This cause having come on regularly for hearing in this court on the 31st day of December, 1923, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. Otto B. Rupp and W. V. Tanner, its solicitors, and the defendants being represented by John H. Dunbar, Attorney General of the State of Washington, and Raymond W. Clifford, his assistant, and Messrs. H. C. Brodie, Thomas J. L. Kennedy, E. K. Murray, J. M. Geraghty and Alex M.

Winston, their solicitors, and after hearing the arguments of counsel for the respective parties, the court having announced its oral opinion and decision that the motion to dismiss should be sustained upon the grounds that the bill of complaint herein does not state any matters of equity entitling the complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought, by reason of the failure to exhaust the right of plaintiff to relief in the superior and supreme courts of the state of Washington;

Now, on this 5th day of January, 1924, the parties herein now appearing by their respective counsel, on motion of the defendants, pursuant to such decision of the court, it is by the court hereby ORDERED, ADJUDGED and DECREED that said motion to dismiss be and it is hereby granted, and that said bill of complaint and this cause of action be and the same hereby are dismissed, and that the defendants have and recover their costs and disbursements herein.

To the foregoing, and each and every part thereof, the plaintiff excepts, and its exception is allowed.

Done in open court this 5th day of January, 1924.

EDWARD E. CUSHMAN,
Judge.

ARGUMENT.

I.

The application for an interlocutory injunction was an application for relief *pendente lite,* and upon the dismissal of the litigation by the foregoing final order, no relief *pendente lite* could be afforded and the question of such relief becomes a moot question, and under innumerable decisions of this court, a moot question will not be passed upon.

Brownlow v. Schwartz, 67 L. ed. 288,
Atherton Mills v. Johnston, 259 U. S. 16,
Heitmuller v. Stokes, 256 U. S. 359,
American Book Company v. Kansas, 193 U. S. 49,
Mills v. Green, 159 U. S. 651,

and numerous other cases cited in the above cases.

II.

When an appeal has been taken from an order denying an interlocutory injunction, and thereafter an order is entered dismissing the complaint and an appeal is prosecuted from such final order of dismissal, the interlocutory appeal should be dismissed and the case considered on the appeal from the final order of dismissal.

Shaffer v. Carter, 252 U. S. 37, 64 L. ed. 445.

It is therefore respectfully submitted that the motion to dismiss the appeal from the order denying an interlocutory injunction should be granted.

JOHN H. DUNBAR,
Attorney General of the State of Washington,

RAYMOND W. CLIFFORD,
Assistant Attorney General of the State of Washington,

H. C. BRODIE,
Counsel for Appellees.

Supreme Court
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No. 539.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

Law Brief Printing Co., Seattle

No. 539.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION.

Brief of Appellant in Opposition to Motion to Dismiss Appeal.

Statement.

This case is a companion of a suit pending in this court entitled The Pacific Telephone and Telegraph Company, a corporation, Appellant, v. Kuykendall, et al, Appellees, same being cause No. 540.

This is an appeal from an order entered April 30, 1923, by a statutory court convened pursuant to section 266 of the Judicial Code denying an application of The Home Telephone and Telegraph Company of Spokane, appellant here, for an interlocutory injunction to restrain the appellees from enforcing a confiscatory rate order of the Department of Public Works of the State of Washington. This denial was not on the merits but upon the sole ground that appellant had not as yet exhausted its purported legislative remedies in the state courts of Washington.

After the denial of the interlocutory injunction, the District Judge refused to proceed in the main case. Thereupon, The Pacific Telephone and Telegraph Company, which had a like case pending in the same court, made an application to the Circuit Court of Appeals for the Ninth Circuit for a writ of mandamus commanding the District Judge to proceed in the case brought by The Pacific Telephone and Telegraph Company. The writ was granted. (Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.) Thereafter, the District Judge did proceed in this case, and on January 5, 1924, entered a decree dismissing the complaint in this case. From this decree of dismissal,

an appeal was likewise taken to this court and is now pending herein as cause No. 789. On motion an order was made on February 25, 1924, advancing this cause No. 539 and the related cause No. 799 on the calendar, and setting them down for argument together on April 14, 1924.

Meanwhile the appellees on February 11, 1924, moved to dismiss the appeal in this cause, arguing that the question therein involved had become moot. This motion was noted for argument for March 24, 1924.

In view of this court's order advancing this cause and cause No. 789 for argument on the merits on April 14, 1924, it would seem desirable that the whole argument in these two related cases be had on the same day rather than piecemeal, and that therefore the motion to dismiss the appeal should be passed for consideration until April 14th.

The argument in this case is identical with the argument made on behalf of The Pacific Telephone and Telegraph Company in case No. 540. For convenience sake only, we reprint that argument here.

Argument.

In order to determine whether appellees' motion to dismiss the appeal on the ground that the question has become moot, is well taken, the precise nature of the question involved in this appeal and the status of the litigation must be considered.

The only question before the court on this appeal from the order denying an injunction *pendente lite* is whether appellant had the right to sue in the United States court at the time it filed its complaint, or whether as a condition precedent appellant was first required to exhaust its alleged legislative remedies in the state courts of Washington.

As already stated the statutory court did not pass on the merits. Hence, on this appeal, this court will determine the jurisdictional question only, and if it holds that the statutory court was wrong in refusing to pass on the merits of the application, will remand the cause to the statutory court for that purpose.

An analogous situation was presented in *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, 293, where, after determining that the statutory court

erred in refusing to pass on the merits of the application for an interlocutory injunction, this court said:

"As in our opinion the District Court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that Court, with directions to proceed to the trial. Generally it is not desirable that we should pass upon such matters until they have been dealt with below."

As, therefore, this court will not in general pass on the merits of the application for relief *pendente lite* before that question has been considered below, there is in this appeal no question of injunctive *relief* but merely a jurisdictional question.

Clearly, the argument of the appellees, that the question is moot because *no relief pendente lite* may be granted, is unsound because no relief *pendente lite* would be granted by this court in any event. Hence it cannot be said that the case is moot on the usual ground that a decree would be wholly ineffectual and inoperative. If moot at all, it must be on some other ground. But this cause can only be moot if the adjudication of the jurisdictional question has become wholly immaterial. Has it? The answer is that question depends upon whether

the litigation has ceased or is still pending. If the litigation is still pending, then the question of jurisdiction in this case, as in every other case, is still a vital one; in fact, it is the *sine qua non* of the suit. Although after the present appeal from the order of the statutory court denying relief *pendente lite*, the trial judge during subsequent proceedings in the main cause below dismissed the complaint, yet an appeal from the decree was immediately taken. That a cause on appeal is still a pending cause hardly requires citation of authority.

Ex parte Craig, 274 Fed. 177, 187;

Gore v. Stacpoole, 1 Dow. (H. L.) 18, 31;

Holland v. Fox, 3 El. & Bl. 977, 985;

Howell v. Bowers, 2 Cr. M. & R. 621;

Brasch v. Brasch, 50 Neb. 73;

Boone v. Boone, 160 Iowa 284;

Hupp v. Hocking Oil & Natural Gas Co., 88 Ohio St. 61;

Ex parte James Mumford, 57 Mo. 603, 606;

In re Egan, 24 S. D. 301;

State Board of Examiners v. Hart, 104 Minn. 88;

Pemberton v. Pemberton, 169 Ky. 476.

As the cause is still pending, the jurisdictional question must be determined. The motion to dis-

miss this appeal, therefore, raises only a question of practice: whether the jurisdictional question will be determined on this appeal from the order of the statutory court, or on the appeal from the decree of dismissal of the District Judge. The question not being moot and section 266 of the Judicial Code having provided for a separate appeal from an order denying the interlocutory injunction, it would seem that the question should be determined in the appeal where it is first raised.

Counsel rely upon *Shaffer v. Carter*, 252 U. S. 37, but they misconstrue the effect of that decision. In that case there were two appeals from a single decree rendered in a suit in equity heard before a statutory court. The statutory court not only denied the application for the interlocutory injunction, but also dismissed the complaint by the same decree. Assuming that the statutory court which, under section 266, is expressly given only the power to grant or deny an interlocutory injunction, also has the power to dismiss the complaint for want of equity, still in that case there was only one decree, a final decree, in which was merged the order denying the interlocutory injunction. Obviously an appeal could not be taken from that final decree on the theory that it was interlocutory but only on the theory that the decree was final. That case is,

therefore, merely authority for the proposition that where a statutory court (convened pursuant to section 266) in addition to denying the application for an interlocutory injunction dismisses the complaint in the same decree, an appeal should be taken from the final decree of dismissal under section 238 of the Judicial Code.

Here the situation is entirely different. In this case an appeal is taken, pursuant to section 266, from an order of the statutory court, denying relief *pendente lite*, and eight months later the District Judge, in whose court the main case was pending, entered a decree of dismissal from which an appeal is taken. Here it can hardly be said that an order of the statutory court is merged in the final decree of the District Judge. There can be no merger under such circumstances. If, therefore, the question involved in the appeal from the interlocutory injunction is not moot and if the order of the statutory court is not merged in the decree of dismissal of the District Judge, then the appeal in this cause cannot be dismissed but it must be determined in due course.

In the case of *Male v. The Atchison, Topeka & Santa Fe Railroad Company*, 240 U. S. 97, a motion

was made to dismiss an appeal for want of jurisdiction. The reason assigned for the motion was that the question involved on the appeal had become moot in that after the rendition of the order of the lower court declining to take jurisdiction, the appellant had sued upon the same alleged cause of action in the Supreme Court of the State of New York, where a final judgment on the merits was entered dismissing the complaint. This court refused to dismiss the appeal, assigning as its reason for its refusal that it was concerned with the jurisdictional question only, and that the motion to dismiss was based on matter going to the merits. This court, therefore, proceeded to determine the question as to whether the lower court as a United States court had power to entertain the cause.

So in the present case the question before this court is whether the statutory court as a United States court should have entertained the cause and passed upon the question of relief *pendente lite.* This question still remains regardless of the decree of dismissal of the District Judge, from which an appeal has also been taken.

It may possibly be that if, after the decree of dismissal was entered in this cause by the District Judge, no appeal had been taken therefrom, and the

time for appeal had expired, this court might not adjudicate the question whether the statutory court should have assumed jurisdiction, but such is not the case.

The case of the *City of Wallace v. Deane* (Idaho) 69 Pac. 62 is in point. In that case an appeal was taken from an order of the District Court dissolving a temporary injunction. Subsequently in the main cause below a final judgment was entered in favor of the defendant, from which final judgment no appeal was taken and the *time for appeal had expired.* Upon this ground the motion to dismiss the appeal was sustained since the controversy had completely ceased. Applying that reasoning to the present case, it follows that where an appeal has been taken from a final judgment dismissing the complaint, the controversy has not ceased and an appeal from an order denying a temporary injunction still presents a justiciable question.

Should this court, however, be of the opinion that the jurisdictional question should not be separately considered upon the present appeal, it will and must consider that question upon appeal from the final decree of the District Judge dismissing the complaint. This is true because this court must in any event determine the jurisdictional question, and

secondly because if the appeal from the denial of the interlocutory injunction will not be separately considered, still upon appeal from the final decree every interlocutory order affecting the rights of the parties regarding the matters in question between them, is subject to review in the appellate court and will be decided at the same time.

Central Trust Company v. Seasongood, 130 U. S. 482;

Perkins v. Fourniquet, 6 How. 206, 209;

Forgay v. Conrad, 6 How. 201;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1, 22;

Western Union Telegraph Co. v. The U. S. and Mexican Trust Company, 221 Fed. 545, 551.

While the rule of these cases ordinarily applies only where no separate appeal is provided by statute from an interlocutory order, still if in the opinion of this court the condition of this cause is now such that the appeal from the interlocutory order should no longer be separately considered, then the rule applies with full force and this court will, upon appeal from the final decree, consider the

question of whether the interlocutory order was properly made.

Respectfully submitted,

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

W. V. TANNER,
C. M. BRACELEN,
Of Counsel.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 790

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, APPELLANT,

vs.

E. V. KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL., ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON

FILED FEBRUARY 4, 1924

(30,100)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 790

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[fol. 1] NAMES AND ADDRESSES OF SOLICITORS

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Dunbar, John H., Attorney General of the State of Washington, Olympia, Washington; Clifford, Raymond W., Assistant Attorney General of the State of Washington, Olympia, Washington, solicitors for appellees.

IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

In Equity. No. 167 E

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a Corporation, Plaintiff,

vs.

E. V. KUYKENDALL, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the Persons Constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants.

BILL OF COMPLAINT—Filed April 24, 1923

To the Judges of the District Court of the United States for the Western District of Washington, Southern Division:

The Home Telephone and Telegraph Company of Spokane, a corporation organized and existing under the laws of the State of Washington, brings this, its bill of complaint, against the defendants, and thereupon complains and charges as follows:

I. That it is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, having [fol. 2] its principal place of business at Spokane, in said state, and

is a citizen of said state. That during all of the times referred to in this bill of complaint it has owned and operated, and now owns and operates, a telephone system and has been, and is now, engaged in operating and conducting a public telephone system in the City of Spokane and the territory adjacent thereto, referred to herein as the Spokane Exchange.

II. That the defendant E. V. Kuykendall is the duly appointed, qualified and acting Director of Public Works of the State of Washington, and is a citizen and resident of the Eastern District of Washington; that the defendant Hance H. Cleland is the duly appointed, qualified and acting Supervisor of Public Utilities of said state, and is a citizen and resident of the Eastern District of Washington; that the defendant Frank R. Spinning is the duly appointed, qualified and acting Supervisor of Transportation in said state and is a citizen and resident of the Western District of Washington. That said E. V. Kuykendall, Hance H. Cleland and Frank R. Spinning are the members of and constitute the Department of Public Works of the State of Washington. Said defendants will be hereinafter referred to as the Department. That the defendant John H. Dunbar is the duly appointed, qualified and acting Attorney General of the State of Washington, and is a citizen and resident of the Western District of Washington.

III. This suit is of a civil nature in equity and is brought for the purpose of enjoining the enforcement of an order made by the said Department of Public Works on March 31, 1923, which said order prescribes the maximum rates and charges to be charged by plaintiff for telephone service in the City of Spokane and the territory adjacent thereto, for the reason that said rates and charges are confiscatory of plaintiff's property used or useful in furnishing said service to the public, and, in consequence, said order seeks to deprive plaintiff of its property without due process of law, and denies to plaintiff the equal protection of the law in violation of its rights under the Fourteenth Amendment of the Constitution of the United States, and is therefore null and void.

The amount in controversy in this suit exceeds the sum or value of $3,000, exclusive of interest and costs.

IV. That on August 8, 1919, the Public Service Commission of Washington, an administrative body duly created by the statutes of said state, and the predecessor of, exercising like powers as, the said Department of Public Works, made an order prescribing the maximum rates and charges to be charged by plaintiff on and after August 1, 1919, for telephone service, in the Spokane Exchange. A copy of said rates is filed herewith, marked Exhibit "A" and hereby specially referred to and made a part hereof.

V. That on September 20, 1922, plaintiff filed with the said Department a schedule of rates increasing the rates to be charged by plaintiff for exchange telephone service in said Spokane Ex- [fol. 3] change. A copy of said schedule is filed herewith, marked Exhibit "B" and hereby specially referred to and made a part hereof.

VI. That on September 24, 1922, the said Department issued an order suspending for the full statutory period the operation of said rates so filed by plaintiff on September 20, 1922.

VII. That subsequent to the dates hereinbefore mentioned said Department held hearings in the City of Spokane for the purpose of determining the value of plaintiff's property used and useful in rendering telephone service therein; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said exchange; and the reasonableness or unreasonableness of the schedule of exchange rates for the Spokane Exchange filed by it as aforesaid on September 20, 1922. That on the 31st day of March, 1923, said Department made an order, a copy of which is filed herewith, marked Exhibit "C" and hereby specially referred to and made a part hereof, determining the value of plaintiff's property used for the public convenience in rendering telephone service in the Spokane Exchange as of June 30, 1922. That on the 31st day of March, 1923, two of the three members of said Department made an order, a copy of which is filed herewith, marked Exhibit "D" and hereby specially referred to and made a part hereof, whereby the application of plaintiff to increase its rates for telephone service in said Spokane Exchange was denied. That on the same date, to-wit, March 31, 1923, the Supervisor of Public Utilities and a member of said Department, who was present at all of said hearings, filed a dissenting opinion, a copy of which is filed herewith, marked Exhibit "E" and hereby specially referred to and made a part hereof, by the terms of which he found that the rates then and theretofore being charged by plaintiff in its Spokane Exchange were unreasonable and less than sufficient, and in which he fixed certain rates as reasonable and not more than sufficient. That said rates so found as reasonable by said Supervisor of Public Utilities, as set forth in said dissenting opinion, Exhibit "E," are the rates set forth by plaintiff in the schedule filed herewith, marked Exhibit "F" and hereby specially referred to and made a part hereof, which the plaintiff proposes to establish and make effective pending the final decree in this cause.

VIII. The cost to plaintiff of its property in the Spokane Exchange (land being included at present value), now being used or useful in furnishing telephone service to the public therein and exclusively devoted to the rendition of that service, was, as of the 31st of December, 1922, the sum of $4,266,899. That the cost to plaintiff of its said property in said Spokane Exchange is now somewhat in excess of that amount on account of additions and betterments in the meantime made thereto. That the cost to plaintiff of its property in the Spokane Exchange is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments made thereto since that time. The present cost [fol. 4] of reproduction of said property as it existed on the 31st day of December, 1922, is the sum of $8,039,784. That the cost of reproduction of said property less depreciation as of the 31st day of

December, 1922, is the sum of $7,382,484. The fair and reasonable value of said property for said Spokane Exchange is the sum of $5,710,684.

The foregoing statements as to the cost to plaintiff of said property include nothing on account of the item of franchise, or the item known as going concern value, but said latter item has been considered in the present cost of reproduction and the present fair and reasonable value of said property.

IX. The fair annual return which plaintiff is entitled to earn under rates imposed upon it by public authority is an amount equal to not less than eight per cent of the fair and reasonable value of its property used or useful in the rendition of the service covered by the rates in question.

X. That the plaintiff's telephone business in the Spokane Exchange has been conducted efficiently and economically during all of the times herein referred to. Plaintiff's net earnings derived from its telephone business within the Spokane Exchange as stated in rate per cent annual return on the cost of the property on the one hand and on the fair value thereof on the other, used or useful in furnishing said service and exclusively devoted to the rendition thereof during each of the periods stated have been as follows:

	On cost	On fair value
Year 1919	2.95%	2.14%
Year 1920	1.79%	1.30%
Year 1921	2.35%	1.71%
Year 1922	3.07%	2.28%

At all of the times aforesaid the fair and reasonable value of said property has been an amount substantially in excess of its cost.

XI. That the rates of plaintiff in the Spokane Exchange established and in force, as herein set forth, during the years, 1919, 1920, 1921 and 1922, and which are in effect under the order of said Department of March 31, 1923, were and are not compensatory, and were and are less than just and reasonable rates. That the amounts by which the net revenue derived by the plaintiff from its telephone business in the Spokane Exchange were less than eight per cent of the cost of the property used and useful and exclusively devoted to the rendition of service within said exchange were for the

Year 1919	$193,042
Year 1920	237,883
Year 1921	219,784
Year 1922	202,655

[fol. 5] XII. That the maintenance of the rates and charges as aforesaid in Exhibit "A" under the order of said Department of March 31, 1923, compels the plaintiff to provide service at rates which are not compensatory and which are less than just and reasonable, and results in the confiscation of the property of plaintiff in the

Spokane Exchange devoted to public use, and deprives plaintiff of its property without compensation and without due process of law and denies to it the equal protection of the laws, in violation of the Constitution of the United States, particularly Article Fifth and the Fourteenth Amendment thereof. That said order of March 31, 1923, is therefore null and void. That if said order of March 31, 1923, is enforced and plaintiff is compelled to charge the rates therein prescribed, and if plaintiff shall practice all reasonable economies consistent with adequate and efficient service to the public, the financial results will be as follows: Plaintiff will be prevented from earning any return in excess of 1.88 per cent per annum upon the fair and reasonable value of said property in said exchange. That had the rates set forth in Exhibit "F," being the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair, reasonable and sufficient, been in effect for the year 1923, the return of plaintiff thereunder on the fair value of its property would have been 5.52 per cent, and for the same period upon the cost of its property in said Spokane Exchange, as found in said dissenting opinion, of 7.64 per cent. And plaintiff avers that the rates and charges set forth in said Exhibit "F" are less than the just and reasonable rates and charges to which it is lawfully entitled, but plaintiff proposes to establish and put into effect said rates and charges pending the final decree in this cause.

XIII. That the plaintiff has no adequate remedy at law, and should it fail to observe the rates and charges specified in said schedule Exhibit "A" and make and enforce the rates and charges as specified in Exhibit "F," or any rates or charges higher than those specified in said Exhibit "A," or any rates not sanctioned by the Department of Public Works of Washington, the defendants will, unless restrained by the order of this court, institute and cause to be instituted proceedings to compel compliance with said schedule Exhibit "A," and the plaintiff, its directors, officers, agents and employees will be subjected to a multiplicity of suits and incur the penalties and punishments prescribed by the laws of the State of Washington, and may, under the provisions of said laws, be charged with the commission of gross misdemeanors, each punishable under the laws of Washington by a fine of $1,000, or imprisonment in a county jail of one year, or both,

That unless the defendants are restrained and enjoined as herein prayed, plaintiff, its directors, officers, agents and employees, will be deterred and prevented by the threat of numerous and excessive fines and of imprisonment as aforesaid, from putting into effect the said schedules of rates and charges in said Exhibit "F," or any rates and charges other than those provided in said Exhibit "A," [fol. 6] and thereby plaintiff will be forced to submit to the confiscation of its property without due process of law and in violation of its rights under the Constitution of the United States, as hereinbefore alleged.

That unless the defendants are restrained and enjoined, as herein

prayed, plaintiff's subscribers and other patrons will be induced and caused to resist and refuse payment of any rates and charges other than those provided in said Exhibit "A." That because of the nature of the business of the plaintiff and the small sums of money generally due monthly from each of its subscribers and patrons, it is impracticable for plaintiff to enforce collection thereof by actions at law, and as a result thereof plaintiff's property will be confiscated as aforesaid. That plaintiff has no practical way to enforce and collect its rates and charges except by cutting off and refusing service for default in payment of its bills rendered monthly therefor, and its subscribers and patrons will, as plaintiff believes and so alleges, institute large numbers of suits to restrain plaintiff from cutting off and denying service for such non-payment of bills and for damages, and plaintiff will thereby be subjected to an endless multiplicity of suits, and plaintiff's property will be confiscated, to plaintiff's irreparable loss and damage, all as hereinbefore alleged.

That large numbers of suits will be brought by defendants and plaintiff's subscribers and patrons to restrain an- enjoin plaintiff, its directors, officers, agents and employees, from putting into effect said schedule Exhibit "F" or any schedule other than said Exhibit "A," and to compel plaintiff to furnish telephone service for the unlawful and confiscatory rates provided in said schedule Exhibit "A." That the issues which will be presented in each said suit are presented and should and will be decided in this action.

Wherefore, the plaintiff prays the judgment and decree of this Court:

First. That the rates and charges set forth in said schedule Exhibit "A" and prescribed by said Department of Public Works, be decreed to be confiscatory, in violation of the Constitution of the United States and the said order of March 31, 1923, imposing the same to be void and of no effect.

Second. That defendants, and each of them, and all other persons be temporarily and permanently restrained and enjoined from any attempt to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates, tariffs and charges now prescribed by said Department of Public Works, as set forth in said schedule Exhibit "A" filed herewith, or from any attempt to compel the plaintiff to continue to observe or maintain said rates or charges.

Third. That defendants, and each of them, and all other persons be temporarily and permanently restrained and enjoined from any attempt to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect said schedule Exhibit "F" and charging and collecting the rates and charges therein set forth until just and reasonable schedules of rates and charges are established according to law.

[fol. 7] Fourth. That the defendants, and each of them, and all other persons, be temporarily and permanently restrained and enjoined from taking any steps or proceedings against the plaintiff,

its directors, officers, agents or employees, to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding said rates and charges, Exhibit "A," or putting into effect any schedule of rates and charges not in excess of those set forth in Exhibit "F."

Fifth. That the plaintiff have such other and further relief as may be just and equitable in the premises.

May it please your Honors to grant unto the plaintiff a writ of supœna of the United States of America issuing out of and under the seal of this Honorable Court, directed to the said E. V. Kuykendall, Hance H. Cleland, Frank R. Spinning and John H. Dunbar, commanding them, and each of them, on a day certain to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises and to perform and abide by such orders, direction or decree as may be made against them in the premises, and that pending the final hearing of this cause a temporary restraining order may be issued as above prayed.

And the plaintiff will ever pray.

The Home Telephone and Telegraph Company, of Spokane, by Otto B. Rupp, Post, Russell and Higgins, Pillsbury, Madison & Sutro, Its Solicitors.

Jurat showing the foregoing was duly sworn to by J. C. Nowell omitted in printing.

[fol. 8] The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Wash., Effective August 1, 1919

W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane, Spokane County, Washington

Business—Unlimited Service

EXHIBIT "A" TO BILL OF COMPLAINT

	Rate per month	
	Wall set	Desk set
Individual Line	$7.50	$7.75
Two-party Line	....	....
Extension (with or without bell)	1.00	1.00
Suburban Service, Ten-party Line (See Section 3)	3.50	3.75

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	3.25	4.50
Two-party Line	2.50	2.75
Four-party Line	2.00	2.25
Extension (Without Bell)	.50	.75
Extension (With Bell)	.65	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

Primary Rate Area—See Map**

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

**Opportunity Exchange—Two mile radius from central office.

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

[fol. 9] W. P. S. C. No. 2, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane, Spokane County, Washington

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.04
Auxiliary Line	2.50	2.75	...	...
Extension (With or without bell	.75	.75	...	...

Residence—Measured Service

Individual Line	...	...	...	...
Extension (Without bell)	...	...	...	...
Extension (With bell)	...	...	...	...

Business—Coin Box Service

	Rate per day		Exchange messages per day	Each additional exchange message
	Wall set	Desk set		
Individual Line	$.15	*	3	$.05
Extension (With or without bell) per month	1.00	1.00	...	...

*25c per month additional.

Residence—Coin Box Service

Individual Line.....	...	...	...	...
Extension (Without bell) per month....	...	...	...	...
Extension (With bell) per month	...	...	...	...

Issued: April 1, 1919. Effective: April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

[fol. 10] W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Unlimited Service

	Rate per month
Switchboard, with battery power, ringing circuit and switchboard telephone for each position, equipped for 15 lines	$2.00
Additional switchboard equipment for each group of 5 lines or less	.20
First bothway trunk line—Indi-idual business rate plus $2.00 per month.	
Each additional bothway trunk line—rate for first bothway trunk line less 25%.	
Each incoming trunk line—Individual business rate less 20%, minimum $4.00 per month.	

	Wall set	Desk set
Each station, primary or extension, not in guest rooms (See Mileage Rates, Section 3)	$1.00	$1.00
Each station, primary or extension, the guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Two (2) trunk lines and ten (10) stations excluding switchboard telephone.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

Issued: April 7, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

*In accordance mith Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

[fol. 11] W. P. S. C. No. 2, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Private Branch Exchange Service

Business Hotel—Measured Service

	Rate per month
Switchboard with battery power, ringing circuit and switchboard telephone for each position	None.
Trunk Lines—Bothway only	None.
(Enough bothwaf trunk lines will be provid- to properly handle the traffic)	
Each exchange message	$.025

	Wall set	Desk set
Each station, primary or extension, in guest rooms (See Mileage Rates, Section 3)	$1.00	$1.00
Each station, primary or extension, in guest rooms:		
1 to 10 inclusive	.50	.75
11 to 20 inclusive	.45	.70
21 to 35 inclusive	.40	.65
36 to 50 inclusive	.35	.60
Over 50	.25	.50

Minimum installation: Ten (10) stations excluding switchboard telephones.

The switchboard is furnished in any standard size to meet the subscriber's requirements.

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside primary Rate Area, see Mileage Rates, Section 3.

Issued: April 1, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

*In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

C. E. Hickman, General Manager.

[fol. 12] W. P. S. C. No. 2, Section 3

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Farmer Line Service

Total Number of Stations

	Rate per year
300 stations or less	$3.00
300 to 500 stations	3.60
500 to 750 stations	4.20
750 to 1,000 stations	5.40
1,000 to 2,000 stations	7.20
2,000 to 4,000 stations	8.40
4,000 to 6,000 stations	9.60
6,000 to 8,000 stations	10.80
8,000 to 12,000 stations	12.00
12,000 stations and over	15.00

Company Furnishes.—For not less than 5 subscribers per circuit, switchboard, and facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, Company furnishes facilities to city or town limits. Central Office Service. Listing in Directory. Code Ring Card.

Subscriber Furnishes.—Facilities to boundary of Primary Rate Area, except where city or town limits are beyond this boundary. In such cases, subscriber furnishes facilities to city or town limits. Complete telephone and battery, sub-station protection. Maintenance of above.

The subscriber will be allowed a discount of Ten Per Cent (10%) on the charge for exchange service, if bill is paid at the Company's office during the first month of the year. New subscribers will be billed from the date of connection to the end of the year, and annually in advance thereafter. Initial bills rendered new subscribers

will be subject to a Ten Per Cent (10%) discount on the charge for exchange service, provided the bill is paid at the Company's office within thirty days after date of bill.

Farmer Line stations shall not be located within the Primary Rate Area.

Issued: April 1, 1919. Effective April 1, 1919.*

Cancels and supersedes Exchange Rate Schedule effective February 20, 1915.

C. E. Hickman, General Manager.

[fol. 13] EXHIBIT B TO BILL OF COMPLAINT

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Wash., Filed September 20, 1922, and not Withdrawn

W. D. P. W. No. 3, Section 1

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Exchange—Spokane and Opportunity, Spokane County, Washington

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.00	$10.25
Extension (With or without bell)	1.00	1.25
Suburban Service—Ten-party Line (See Sec. 3)	3.50	3.75

Business—Measured Service

	Rate per month		Exchange messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (With or without bell)	.75	1.00	...	...

* In accordance with Order of the Public Service Commission of Washington in Case No. 4747.

Semi-public—Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	$*	$.05
*25c. per month additional.			
Extension (With or without bell) Per month	1.00	1.25	....

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.00	$4.25
Two-party Line	3.25	3.50
Four-party Line	2.75	3.00
Extension (With or without bell)	.75	1.00
Suburban Service—Ten-party Line (See Section 3)	3.00	3.25

[fol. 14] Primary Rate Area, See Map

Rates are effective inside Primary Rate Area unless otherwise indicated. For service outside Primary Rate Area, see Mileage Rates, Section 3.

*Opportunity Exchange—Two-mile radius from central office.

Farmer Line Service (See Section 3), each station, $15.00 per year.

Issued: October 2, 1922. Effective: November 1, 1922.
Cancels and supersedes Exchange Rate Schedule effective April 1, 1919.

G. A. Walker, Assistant Secretary.

W. D. P. W. No. 3, Section 2

The Home Telephone and Telegraph Company of Spokane

Exchange Rate Schedule

Semi-public

Private Branch Exchange Service

Hotels desiring intercommunication between guest rooms stations and management stations and exterior service for both guest room and management stations shall be furnished semi-public private branch exchange service subject to the following conditions:

(a) The hotel proprietor is required to become and act as the telephone company's agent in furnishing and selling telephone service to guests.

(b) The hotel agreeing:

(1) To charge the authorized rates for all telephone service rendered to guests and patrons.

(2) To collect for the telephone company at the established rates for exchange and interexchange service the charges incurred by patrons and guests and to remit such charges to the telephone company.

(3) To maintain service at proper standards.

(4) To furnish all operating at the private branch exchange switchboard for the transmission supervision and recording of messages sent to the central office from the private branch exchange system.

(c) The telephone company agreeing:

(1) To furnish facilities and exchange service in accordance with the following schedules, and interexchanges service at published rates.

[fol. 15] (2) To pay the hotel a commission on exchange interexchange messages originating at guest room and lobby stations and charged to the hotel.

	Rate per month
Switchboard with battery power ringing circuit, position dial, switchboard telephone, each position, Cordless type	$3.00
Non-multiple cord type:	
10 lines or less in use	5.00
11— 30 lines in use	6.00
31— 60 lines in use	7.00
61—100 lines in use	8.00
101—150 lines in use	9.00
151—200 lines in use	10.00
201—260 lines in use	11.00
261—320 lines in use	13.00
Multiple cord type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Rate per month

(a) Stations in hotel office and other locations on premises in which switchboard is located for the exclusive use of the hotel management:

Each station, without dial—Wall Set.....	1.00
Desk Set.....	1.25
Each station, with dial—Wall Set.....	1.25
Desk Set.....	1.50

Stations outside premises in which switchboard is located, see Mileage Rates—Section 3.

(b) Station in guest rooms and lobby:

Each station, without dial—Wall Set.....	.50
Desk Set.....	.75
Each station, with dial—Wall Set.....	.75
Desk Set.....	1.00

Stations furnished in hotel lobbies connected to the switchboard attended by the hotel operator shall be provided with coin boxes (post-payment type) provided they are distinctly placarded as hotel telephones so as to be distinguished from the telephone company's regular public telephone station. Stations without coin boxes may be furnished at the hotel desk for the convenience of visitors inquiring for guests
[fol. 16] when restricted to interior use. Any additional facilities that might be required with such stations, such as booths, coin boxes, switchboards, etc., to be furnished and charged the hotel at regular rates.

(c) Trunk lines to central office for use in connection with stations in hotel office and other locations for the exclusive use of hotel management. Outgoing trunk lines only:

Individual line business unlimited rate.
Tie lines between separate switchboards—See Mileage Rates, Section 3.

Both way trunk lines to central office for use in connection with stations in guest rooms and lobby and for all incoming messages to be furnished without charge to meet traffic requirements.

The rate for each local exchange message originating at stations in guest rooms and lobby and passing through the hotel private branch exchange switchboard to the central office shall be five cents except that in those cases where the additional service rendered the public at the hotel warrants, a rate of ten cents for each of these local exchange messages may be charged when applied for by the hotel and accept by the Telephone Company.

The mechanical or electrical design of the private branch exchange will be such that guest room and lobby stations cannot be

connected to the outgoing trunk lines provided for the exclusive use of the management.

If the switchboard is to be installed outside the primary rate Area, see Mileage Rates, Section 3.

Issued: October 2, 1922. Effective: November 1, 1922.

Cancels and supersedes Exchange Rate Schedule effective April 1, 1919.

G. A. Walker, Assistant Secretary.

[fol. 17] EXHIBIT C TO BILL OF COMPLAINT

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON

No. 5344

DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, Complainant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY and THE HOME TELEPHONE AND TELEGRAPH COMPANY of Spokane, Respondents.

Order Relating to Valuation of the Home Telephone and Telegraph Company of Spokane

General Statement

This matter arose thru the necessity for determining the valuation of the telephone property of The Home Telephone and Telegraph Company of Spokane (hereinafter referred to as the respondent) as a step in the department's state wide investigation of the telephone situation initiated by its complaint in this cause dated January 21, 1922.

Hearings in this cause, pursuant to notice duly given, were held before the department in Olympia, December 18, 1922, and in Spokane on January 22, 1923, and February 28, 1923, at which hearings the department, the City of Spokane, the respondent and other parties were represented, witnesses were sworn and examined, documentary evidence was received, briefs being submitted and the department now being fully advised in the premises makes and enters the following findings of fact and order:

Findings of Fact

I. That The Home Telephone and Telegraph Company of Spokane was organized January 19, 1905. As of June 30, 1922, the date to which all of the following findings refer unless otherwise specifically mentioned, it is found to be owning and operating the telephone exchange plant within the City of Spokane and the rural territory immediately adjacent thereto, together with certain toll lines and facilities within the City of Spokane whereby respondent's subscribers may be connected to the toll lines of the Pacific Telephone and Telegraph Company at the city boundaries.

II. The respondent by means of the property owned and operated by it renders telephone service to the citizens of Spokane for hire and it is therefore a public service company subject to the laws governing the regulation of all such companies by this Department.

[fol. 18] III. For a time prior to 1915 two telephone companies operated in Spokane, one, the respondent, known as the "Home" or "Independent" company and the other, the Pacific Telephone and Telegraph Company, sometimes referred to as the "Pacific" or "Bell" company. During the year 1914 the Pacific Company acquired the capital stock of the Home Company and on January 18, 1915 sold its Spokane properties to the latter. The consideration in this transaction was as follows:

Thirty year 5% 1st Mortgage Bonds of the Home Company	$1,338,000.00
6% Promissory Note of the Home Company	1,147,927.66
Cancellation of Pacific Company indebtedness to the Home Company	329,600.00
Total	$2,815,527.66

The property conveyed by the Pacific Company is subject to a mortgage given to secure an issue of bonds of the Pacific Company amounting to $35,000,000. The proportion of such indebtedness secured by the property conveyed was $1,500,000. The two properties were consolidated with the result that since 1915 only one company, the respondent, has given telephone service in Spokane. The Pacific Company, thru its stock ownership of the Home Company controls the operations of the respondent. In practical effect this situation places Spokane in the relation of an exchange of the Pacific Company.

IV. The cost of construction and equipment of the property embraced in the fixed capital accounts as derived from the books and records of respondent is $3,946,642.74. This figure differs from the amount now carried by the respondent on its books, which with minor adjustments is $3,467,675.01 and was obtained by adding the net additions since January 1, 1915, to a starting figure as of that date composed of the full book value of the Fixed Capital Accounts of the Home Company plus the "Structural" or "Physical Condition" book value of the Pacific Company. The first figure stated above is derived from a starting figure as of the date of the consolidation composed of the actual book cost figures of the Fixed Capital Accounts of both companies. An amount of $2,116,247.69 carried by the respondent as "Miscellaneous Investments" is not considered in the above figures. The amount of $3,946,642.74; above stated, embraces all of the Fixed Capital Accounts, both exchange and toll, representing property owned by the respondent both used and not used for the public convenience. It therefore includes certain items of plant acquired in the consolidation, that

should be eliminated from consideration in a rate base as not being used for the public convenience. This non-used plant will hereinafter be itemized in detail.

V. The present cost of construction, or what is the same thing, the cost of reproduction, of the respondent's telephone property [fol. 19] used and useful for the public convenience, is $6,900,000. This amount was arrived at by applying to an actual field inventory of plant units embraced in the Fixed Capital Accounts as of June 30, 1922, unit prices derived from a price trend study over a principal construction period of three years, subsequent to the date of the inventory.

VI. The cost of reproduction of the property embraced in the fixed capital accounts, less accrued depreciation is $5,900,000. The property is found to be in approximately eighty-five per cent physical condition.

VII. The outstanding capital stock of respondent, all of which with the exception of directors' qualifying shares, is owned by the Pacific Telephone and Telegraph Company, amounts to a par value of $1,250,000, consisting of 12,500 shares of a par value of $100 each. The market value of this stock cannot be ascertained, there being no recent transactions to indicate its value.

VIII. The funded debt of respondent consists of an issue of First Mortgage 5 per cent, 30 Year Gold Bonds, to the par value of $3,000,000. There is no evidence to indicate the market value of these bonds.

IX. The respondent has never paid any dividends on its capital stock.

X. As indicating the earning capacity of the respondent it is found that for the first six months of the year 1922 the telephone operating revenues were $607,131.64, and for the same period the telephone operating expenses, taxes, uncollectible revenue, and lincesee contract payment as shown on the company's books amounted to $542,576.22

XI. The territory served by respondent comprises 43.7 square miles, containing a population of approximately 124,500. The company serves 31,257 exchange stations. The density of population is 285.2 per square mile and the percentage of telephone development (ratio of stations to population) is 25.11 per cent. The use of the telephone, as indicated by the number of calls per capita per year, is 490.56.

XII. We find that the expenditures made by the respondent and its predecessors were such as were justified by the then existing conditions and conditions that might reasonably be expected in the immediate future. Likewise, the money expended has been reasonable for present needs and for the needs of the immediate future.

The property as it is found at this date is the result of the merger of two telephone plants as described in Finding III, and in view of that fact it is inevitable that some duplications of facilities would be found. During the period elapsing since consolidation most of these duplications have been eliminated. However, at the present time it is found that certain property, the book cost of which is included in [fol. 20] the amount stated in Finding IV, is either not useful in the public service or is not at the present time used for the public convenience. The land and buildings comprising old automatic offices B and C, the value of which, not including omissions but including interest during construction, is $12,020.01, are not and cannot be used in the public service. They are therefore excluded from the rate base which will be hereinafter found.

Certain underground plant was found not in use at the time of the inventory and a portion of this plant is so situated that it is admitted by the company it will never be used in the public service. The following table shows the items of plant just described.

Item	Potentially useful	Not useful
Exchange Underground Conduit, duct ft....	172,882	8,320
Manholes, number.....	78	7
Exchange Underground, Cable, wire Mi.....	1455.50	0

The value of the foregoing "not useful" plant excluding omissions but including interest during construction, is $5,025.63, which makes a total of $17,045.64 worth of property included in the company's fixed capital accounts which should be eliminated as not now and not likely to be useful in the public service.

The value of the foregoing underground plant which is classified as "potentially useful in the public service" is $109,866.50. From the evidence submitted we find that approximately $20,000.00 worth of this plant should be regarded as properly includible in the rate base since it is in the nature of a reasonable surplus of plant which prudence dictates that all utilities should have. The balance, or $89,866.50, should not be included in a rate base fixed as of June 30, 1922, but the company is entitled to have such portions of this plant in excess of the $20,000.00 before mentioned as may in the future be placed in active service, included in subsequent rate bases. The facts with respect to this matter can be determined when necessary by using the detailed inventory of this plant to be found in the exhibit submitted by our engineers.

XIII. The respondent submitted what is designated an "Actual Performance Appraisal" of its properties. This is the same method of appraisal followed in the state-wide valuation of the Pacific Company on which an order was issued in Cause No. 1810-1825 in 1916. The inventory from which the appraisal was made was carefully checked by our engineers and the unit prices applied to the inventory in order to arrive at the appraisal amounts were likewise checked. These unit prices may be broadly described by the term "Historical

Prices." They are derived from an analysis of the cost records of the work actually done by the company in constructing the property being appraised. They are actual performance costs applying to the greater portion of the units covered by the inventory. Hence an appraisal on this basis should agree closely with the book cost of property. Excluding the respondent's allowance for omis- [fol. 21] sions from the actual performance appraisal, it is found that it is lower than the adjusted book cost of property by a relatively small amount.

There was some contention over the allowance of an item termed "Omissions" included by the respondent in its appraisal figures. The amount involved is $74,587.65, of which $318.69 relates to the non-useful property and $2,198.13 relates to the potentially useful property, all of which is listed in Finding XII, and which the company estimates should be allowed for omitted items. The Department's engineers took the position that a thorough check of the inventory had disclosed that it was accurate to a high degree and that the method of deriving unit prices fully covered any contingencies, therefore this item could reasonably be excluded, and it is excluded from the actual performance appraisal figures and rate base in this order.

The cost of construction and equipment of the property embraced in the fixed capital accounts, estimated by the company on the actual performance basis not including the non-useful property but including the potentially useful property is as follows:

Intangible Capital:	
Organization	$1,200.00
Exchange Plant:	
Exchange Right of Way	10,087.59
Land	121,451.68
Buildings	433,653.17
Central Office Equipment	665,990.38
Station Apparatus	191,237.70
Station Installations	167,877.82
Interior Block Wires	6,634.73
Private Branch Exchanges	168,905.84
Booths and Special Fittings	1,965.93
Exchange Pole Lines	376,027.78
Exchange Aerial Cable	438,855.92
Exchange Aerial Wire	206,351.54
Exchange Underground Conduit	533,544.19
Exchange Underground Cable	391,859.06
Interest During Construction	47,031.73
Total	$3,761,475.06

Toll Lines:

Toll Right of Way	175.24
Toll Pole Lines	24,704.52
Toll Aerial Wire	23,827.53
Toll Underground Conduit	205.33
Toll Underground Cable	25,371 90
Interest During Construction	1,099 41
Total	$75,383.93

[fol. 22] General Equipment:

Office Furniture and Fixtures	28,971.27
General Store Equipment	155.28
General Stable and Garage Equipment	29,338.04
General Tools and Implements	13,357.37
Total	$71,821.96
Grand Total	$3,909,880.95

XIV. Some of the amounts stated in fixed capital accounts of respondent are not satisfactory as indicating the actual or true cost of the property included thereunder. The actual performance appraisal accounts as listed in Finding XIII are believed to indicate reliably the facts as nearly as they may be determined and respondent may, if it elects and obtains the necessary permission from the Interstate Commerce Commission, adjust its fixed capital accounts and set them up in accordance with the values in Finding XIII.

XV. The Working Capital, as distinguished from Fixed Capital, required by respondent in conducting its business, amounts, as an average for the first six months of 1922, to $68,867.74. This amount is made up of accounts as follows:

Cash	$10,628.60
Employees Working Funds	6,091.83
Due from Subscribers and Agents	36,267.91
Materials and Supplies	15,879.40
Total	$68,867.74

"Cash" includes the amount of current funds available for use on demand. "Employees Working Funds" include amounts advanced to employees from which expenditures are made and subsequently accounted for. "Due from Subscribers and Agents" includes amounts due the company on account of services rendered. "Materials and Supplies" include the cost of unapplied material, including the value of materials temporarily in use but not charged out in the company's accounts and other supplies and approximate charges applicable thereto.

The foregoing amounts are reasonable and the total should be included in the Rate Base upon which respondent is entitled to earn a reasonable return.

XVI. The item of Construction Work in Progress as of June 30, 1922, amounts to $3,117.81. This amount should be included in the Rate Base, but due allowance in computing a rate of return must be made by treating the accruals for interest during construction as a part of Income, adding the same to Operating Income before computing the rate of return.

[fol. 23] XVII. All of respondent's property is located within the State of Washington. Such interstate business as it transacts is toll or long distance business over the lines of other telephone and telegraph companies and it is not feasible to make any segr-ation of its operations as between intrastate and interstate business.

XVIII. The respondent submitted an exhibit to show that the "Fair Value" of its property was $5,500,000. The exhibits of the Department's engineers and experts for the City of Spokane discussed "Rate Bases" ranging around $4,000,000 and lower. Counsel for the City of Spokane, in his memorandum on the valuation of this property analyzes the exhibits of his experts and contends for the following formula to determine the rate base.

To the value of the Pacific (Manual) Company's property fixed by the Commission as of December 31, 1914, add the book accounts relating to the Home (automatic) Company's property when the plants were consolidated. Add net additions to plant, cash, employees working funds, and materials and supplies. Deduct value of property not actually in use.

This gives him a figure of $3,864,081.51 which he states in the "actual investment of the company in use." He then assumes the property to be in 90 per cent condition from which he obtains $3,477,673.36, which is the amount he contends for as the rate base.

The Department's engineers submitted an exhibit which, at page 13, shows a rate base using the same formula. The amount arrived at by using the figures of our engineers, which differ somewhat from those of counsel, eliminating the non-useful property and all but $20,000 of the potentially useful property, is $3,958,081.66. This amount includes working capital and construction work in progress.

The method of using the depreciated value of the actual investment in property advocated by counsel for the City of Spokane has never been adopted by this Department, nor, so far as we are aware, do other regulatory bodies regard it with favor. The "cost of reproduction less depreciation" method is used by some, and with some reason as indicating—on a purely physical basis—the "present value" of a property. It has been previously found herein that this amount in this case is $5,900,000. But to our mind the determination of a rate base is a broader problem, including as it does, a variety of factors that must be given consideration. We are of the opinion that there is nothing in the record to justify us in departing from our usual and well established procedure in weigh-

ing the several matters and things prescribed by our Public Service Commission law as affecting value. All of these, which are ascertainable from the record, have been set out in the foregoing findings; wherefore after giving due consideration to all of the matters and things specified by law as tending to show the value of the property used by the respondent for the public convenience, said value is found to be $3,892,000.00 as of June 30, 1922.

[fol. 24] Order

From a consideration of the foregoing facts, the Department concludes and its order is that the value of respondent's property used for the public convenience in rendering telephone service in Spokane as of June 30, 1922, be, and the same is hereby fixed at $3,892,000. Upon this value respondent is entitled to earn a reasonable return, and said value shall hereafter, with net additions, be used as the rate base for this utility, to which may be added the value of underground plant hereafter placed in actual use, after such value exceeds the amount of $20,000 herein allowed.

Witness, The Department of Public Works of Washington this 31st of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Hance H. Cleland, Supervisor of Public Utilities. Frank R. Spinning, Supervisor of Transportation. Attest: J. H. Brown, Secretary.

EXHIBIT D TO BILL OF COMPLAINT

Findings of Fact, Order, and Opinion

Cases Numbers 4902 and 5344

(Majority Opinion)

BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. The City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent

Findings of Fact, Order, and Opinion

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Woman's Civic Club of [fol. 25] Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the state of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the Mayor, Council or Commission and City Attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and asking co-operation in the investigation.

March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley. These men, together with our own engineering and accounting staff, worked continuously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

[fol. 26] On October 5, 1922, the telephone companies filed the toll rate schedules as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these, a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequently to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washingon Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings, except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and to the matters to be considered at that time and place.

[fol. 27] At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel, engineers and accountants.

All the complaints were consolidated for the purpose of hearing and the hearings were joint hearings under the administrative code, requiring a joint decision by the Director of the Department and the Supervisor of Public Utilities and the Supervisor of Transportation.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

Findings of Fact

I

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the state of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76, which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated in an original valuation proceeding.

As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but [fol. 28] it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the statewide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington in its order in Causes 1810-1825, placing a value for rate making purposes upon

the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle, where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account, is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

[fol. 29] "A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the Company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the Company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the Company were not permitted to earn on funds employed in construction work, it must

be permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the cash required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the propriety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more or less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construc-
[fol. 30] tion Work in Progress" in the rate base and to include the interest accretions with operating income, which method acts as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Depreciation

Finding

We find that the annual depreciation charge should be reduced from approximately 6 per cent to 3½ per cent for the period of two years from April 1st, 1923.

Discussion

One of respondents' engineers testified that "depreciation is the sum annually set aside to replace property either worn out or become obsolete in service. In other words, it is the sum that is set aside which, at least theoretically, will keep the plant up to service standard, and keep the dollar whole that is in the business."

Under this view, if a utility investment of one million dollars depreciates in value to $900,000.00, the just amount of depreciation reserve would be $100,000.00.

Stated in another way, the depreciation reserve should at all times approximately equal the difference between the original value and the present depreciated value of the property.

The respondents have not furnished any statement of debits against depreciation reserve segregated as to the State of Washington. In a recent twelve-year period, the amount set aside by the Pacific Telephone and Telegraph Company (not limited to the state of Washington) has been $41,212,207.00. The realized depreciation, or the amount withdrawn from the reserve for replacements, has been $20,137,489.00, leaving a balance of $21,074,718.00, less certain expenditures for extraordinary repairs and other unusual items. In other words, the replacement expenditures have been approximately fifty per cent of the amount set aside for depreciation purposes. In percentage it has been about five per cent per annum, with this company as a whole and slightly more than six per cent in the State of Washington for several years past.

At the close of the year 1914, the balance in the depreciation reserve of the company was $10,369,854.00. Prorating this to State of Washington on the basis of plant values, the balance of Washington was $2,418,457.00. Had the company adopted a three and one-half per cent rate of depreciation at the beginning of the year 1915, and debited the depreciation reserve at the company average of 2.47 per cent, the depreciation reserve as of June 30, 1922, would have been $3,945,493.00, or approximately 16 per cent of the depreciable plant value as of the same date. Taking the actual credits [fol. 31] to the depreciation reserve, for Washington, and debiting for current replacements at the above rate of 2.47 per cent the balance in the reserve as of June 30, 1922, should have been $7,711,014.00 or nearly one-third of the depreciable plant value.

We have found the property of respondents in the State of Washington to be about 85 per cent physical condition.

Under the view expressed by the witness referred to, the depreciation reserve should be approximately 15 per cent of the depreciable property, where the same is found to be 85 per cent physical condition. Had the company accumulated a depreciation reserve at a rate of three and one-half per cent since 1914, the balance would by now be more than 15 per cent as heretofore shown.

In the above calculations we have used the straight line method. If either the sinking fund or annuity method were used by which interest is added to balances, the surplus would be still greater.

The case of "Re Wisconsin Telephone Company" P. U. R. 1922, B. P. 553, decided by Wisconsin Railroad Commission, involved an application of the telephone company for increased rates in the City of Milwaukee. The facts disclosed that the depreciation reserve balance was about one-third of the fixed capital in the Milwaukee exchange.

The commission fixed the rate of depreciation at three and one-half per cent. We quote the following:

"It is evident that the credits to this reserve for the Milwaukee exchange since 1909 have been excessive and that a charge to operating expenses equalling three and one-half per cent of the depreciable property would have, so far as experience at present shows, been ample to supply a safe margin to meet losses on property retired from service in the Milwaukee exchange, to which exchange alone this discussion relates. The use of three and one-half per cent for the purpose of this case is based upon the assumption that the company is correct in its claim that the charges to the depreciation reserve in the future will of necessity considerably exceed the charges in the past and during the war period."

In this case the evidence satisfies us that the charges to the depreciation reserve in the future will be less than in the past.

Modern telephone equipment is more durable than that of earlier periods.

The buildings, pole lines, and other construction by respondents have in recent years been of a substantial, durable and expensive type, which will depreciate more slowly than earlier construction, much of which has already been replaced.

The addition of these high grade units materially increases the rate base upon which the consumer must pay a return and any saving in the way lessened depreciation should be reflected somewhere in a computation to determine a reasonable rate.

Measured by the facts stated and principles announced in the Wisconsin case supra, the reduction of the depreciation allowance to three and one-half per cent for a test period of two years is amply [fol. 32] justified. In the Wisconsin case the reduction was not limited to a specified period.

Another reason which to our mind justifies a trial period is the fact that the Interstate Commerce Commission is now engaged in a study of the problem of depreciation as applied to telephone properties, under the provisions of paragraph (5) of Section 20, of the Interstate Commerce Act.

The first hearing will be held May 1, 1923. The notice of the hearings announces that the straight line, annuity, and sinking fund methods of determining depreciation charges will be investigated. Without conceding that the Interstate Commerce Commission has power to prescribe a method of computing depreciation as applied to telephone properties, which would be binding upon a state regulatory body in the regulation of purely intra-state traffic, we believe that the results of this investigation will be of immense value in arriving at correct methods of determining depreciation and for this reason

have limited the rate herein prescribed to a two year period. The final determination of the I. C. C. should be announced within that time.

We are convinced that measured by any reasonable rule or theory, the depreciation allowance of the respondents in the State of Washington in the past has been greater than necessary. When the depreciation reserve of any public utility becomes greater than the facts of the particular case justify, we believe it proper for the regulatory body to reduce the depreciation allowance, until the amount of the depreciation reserve reaches a proper level.

We will, therefore, order in this case that the depreciation allowance for the two-year period beginning April 1, 1923, shall not exceed three and one-half per cent per annum on the depreciable property of the respondents.

We are not determining hereby a rate of depreciation to be applied generally, in telephone cases. We are here confronted with the fact that more money has accumulated in this fund than necessary, and we are merely reducing the flow until the proper level is reached.

III

The Four and One-half per Cent Contract Licensee Revenue, Dr.

Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station.

Discussion

[fol. 33] This is a uniform contract required by the American Telephone and Telegraph Company of all subsidiary companies.

Under this so-called four and one-half per cent contract the respondents are obligated to pay the American Telephone and Telegraph Company four and one-half per cent of substantially all of their gross operating revenue for certain rights and services. We have no power to prevent any public utility from entering into a contract with a parent company to share with it any portion of its profits. We have the right, however, to say whether such share or any part thereof shall be treated as on operating expense.

Even at the risk of differing from our predecessor, The Public Service Commission, we are compelled to say that we are not in sympathy with this kind of business. If the parent company performs any service or furnishes any equipment for which payment should be made, such compensation should be based on the value

of the service rendered or the reasonable rental of the equipment furnished rather than upon a percentage of operating revenue. We are opposed to an expense item that arbitrarily increases as the revenue increases.

If an increase in rates is allowed in this case, it means that four and one-half per cent of the increase will accrue to the American Telephone and Telegraph Company, and there is no evidence that such company is in need of ad-itional revenue, and the local company will receive no more from the parent company that it is now receiving. This four and one-half per cent contract has been a "thorn in the flesh" in every community where the respondents operate. It gives rise to suspicions of concealment and dishonesty in every hearing in which it is involved. Not having power to annul it we believe the respondents and the American Company owe it to the public to wipe it out and put their dealings with the parent company on the basis of actual value of the service rendered and on a plane that is understandable to the average citizen. However innocent or meritorious it may be in fact, this contract is an endless source of controversy and misunderstanding. The American Telephone and Telegraph Company has in its employ trained and skilled experts who appear at hearings in which this contract is questioned and present skillful expositions of its provisions, and undertake to justify its existence, and yet public distrust of it has increased rather than diminished. We are aware that some courts and commissions have given it their endorsement but after careful consideration we cannot do so. We believe that a utility that has a proper appreciation of the elements that establish wholesome public relation should take steps to remove such a proven source of discord.

In the case of "In re Michigan State Telephone Company P. U. R. 1923-A, page 764," decided by the Public Utilities Commission of Michigan, less than a year ago, the Commission said: "The four and one-half per cent contract between the American Telephone [fol. 34] and Telegraph Company and the Michigan State Telephone Company is not a contract between corporations dealing at arm's length but one between the superior and inferior—a controlling and a controlled company—the parent company and its subsidiary—the parent company and its child. The contract is in effect a contract made by the American Telephone and Telegraph Company as proprietor with the agents of itself as owner of the stock of the Michigan State Telephone Company. The directors and officers of the Michigan State Telephone Company are its directors and officers, because they are made so by a vote of the American Telephone and Telegraph Company as stockholders of the Michigan State Telephone Company."

The Commission further states: "In this case the directors and officers of the Michigan State Telephone Company are elected, directed, influenced and controlled by the American Telephone and Telegraph Company. They exercise not their own judgment and discretion but the judgment and discretion of the American Telephone and Telegraph Company which made and may unmake them.

Under the law of this state the four and one-half per cent contract is at least presumptively void."

Substantially the same relations exist between the respondents in this case and the American Telephone and Telegraph Company as existed between the Michigan Company and the American Company. In the same case the Michigan Commission further states:

"Conceding the invalidity of the four and one-half per cent contract, the American Telephone and Telegraph Company is entitled to be reimbursed for the cost of services performed by it for the Michigan State Telephone Company and to have the integrity of its property used by the Michigan State Telephone Company maintained."

The Commission then proceeds with an exhaustive analysis of the services rendered by the American Telephone and Telegraph Company which are substantially similar to those rendered under a like contract with the respondents in this case, and concludes that ninety cents per station is a just allowance therefor. The respondents in this case have 179,614 stations. Ninety cents per station would amount to $161,653.00. The amount called for by the four and one-half per cent contract on existing rates is $388,365. In other words, the Michigan Commission makes an allowance of something like two per cent instead of four and one-half per cent as provided in the contract. Without going into a further discussion of the value of the services and privileges paid for by the four and one-half per cent fixed in this contract, we will allow 90 cents per station as an operating expense and disallow the remainder.

A few months ago the Nebraska State Railroad Commission in the case of Re Northwestern Bell Telephone Company, 1923 P. U. R. (Adv. Sheets) p. 165, speaking of this contract said: "Considering the question here discussed it appears to us that the basis of charge as provided in the contract is fundamentally wrong and [fol. 35] condemned specially by the Supreme Court of the United States. The company applies the percentage to certain gross revenues received by the applicant. The more revenues the more the charge against revenues for the benefit of the American Company, which method of calculation constitutes a circle,—the more the rates the more the charge, ad infinitum."

In the Minnesota Rate Case (Simpson v. Chepard) 230 U. S. 232, Mr. Justice Hughes used the following language:

"The value of the use as measured by rate cannot be made the criterion when the rate itself is in question."

In the case of the City of Houston v. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-22, No. 16, July 1, 1922 p. 539, is cited by respondents as supporting the contract, but the opinion clearly states that the fact that one company owns stock in another "requires close scrutiny of their

dealings to prevent imposition upon the community served by the company."

We have tried to give close scrutiny to this contract and have reached the conclusion heretofore stated.

Even if an allowance equal to two and one-half per cent is made as an operating expense under this contract the results would not differ materially.

The Pacific Company assigns as a reason for not disturbing this contract that the American Telephone and Telegraph Company and its subsidiary concerns have builded their business and accounting methods upon it. In our opinion if this be true they have builded unwisely on a crumbling foundation.

IV

Machine Switching Project

Finding

We find that the installation of machine switching in Seattle is justified.

Discussion

Machine switching has been installed to replace manual operation in three of the offices of the City of Seattle. Three other offices will be converted to machine switching in the near future. The testimony of respondents' experts is not clear as to what saving in expense, if any, will be made by the substitution of automatic for manual operation. We are satisfied, however, that a material economy will be brought by the installation of machine switching. In addition to the somewhat unsatisfactory testimony upon this point, we cite an article by a recognized authority on such matters, in Vol. 38, Part 2, of the American Institution of Electrical Engineers, page 1571, where the following statement appears:

[fol. 36] "Telephone exchanges must pay their way. If automatic exchanges do not pay, there would not be any of them left in existence today, for this movement is twenty-seven years old. Five exchanges formerly manual were converted to automatic. They range in size from 2,300 lines and 4,400 telephones to 38,000 lines and 44,000 telephones. The totals for the five were 47,000 lines and 65,000 telephones. The comparison of expense is as follows:

	Manual	Automatic
Total operating and maintenance expenses per year	$552,600.00	$136,800.00
Average per line per year	11.77	2.92
Average per telephone per year	8.50	2.11

In other words, the operating and maintenance expenses of automatic operation in the case of these five exchanges were about one-fourth the operating and maintenance expenses of manual operation.

We do not anticipate such favorable results in a multi-office exchange such as Seattle, but a material saving should ultimately result.

The automatic devices used in the five exchanges above referred to are not those of the Western Electric Company, as installed in Seattle, but it is safe to assume that the Western Electric machine switching devices are superior from the standpoint of economy and efficiency. They are a later and somewhat costlier product, and we assume that a concern such as the Pacific Telephone and Telegraph Company would not install a device of inferior type.

We must therefore conclude that the installation of the machine switching device in Seattle will on the whole reduce the company's expenses, and our conclusions and order in this case will be made with that assumption in view.

In arriving at this conclusion we have taken into consideration the greater fixed charges which will accrue on the automatic system by reason of the greater capital outlay.

In addition to financial economies, the installation of machine switching to replace manual equipment is further justified for the following reasons:

1. Speed of connection and disconnection.
2. Ease of obtaining connection and disconnection.
3. Accuracy of connection.
4. Voice transmission.
5. Secrecy.

There is also the elimination of some of the faults inherent in manual operation such as:

1. Fluctuations in service.
2. Impairment of service by epidemics, strikes, etc.
3. The mistranslation of calling subscribers' desires.

[fol. 37]

V

Return

Finding

The rate of return to be realized under existing rates and by application of the proposed increased rates, is shown in the following income statement adjusted to meet the views heretofore expressed in relation to depreciation allowance and the four and one-half per cent contract.

[fol. 38]

Statement of Operating Income and Rate of Return
Estimate for Year 1923

	Present rates	Proposed rates
Revenues		
1. Exchange Service Revenues	$6,642,437.00	$8,434,253.00
2. Toll Service Revenues	2,350,000.00	2,732,358.00
3. Miscl. Operating Revenues	308,004.00	308,004.00
4. Total Tel. Oper. Revenue	$9,300,441.00	$11,474,615.00
Expenses		
5. Ordinary Repairs	$1,514,153.00	$1,514,153.00
6. Station Removals and Charges	267,385.00	267,385.00
7. Depreciation	1,070,937.00	1,070,937.00
8. Traffic Expense	2,642,731.00	2,642,731.00
9. Commercial Expense	865,011.00	865,011.00
10. General & Miscl. Expense	234,659.00	234,659.00
11. Rents	79,950.00	79,950.00
12. Uncollectible Revenues	35,618.00	48,367.00
13. Taxes	485,617.00	658,057.00
14. Licensee Revenue—Dr.	161,653.00	161,653.00
15. Total Tel. Oper. Expense	$7,357,714.00	$7,542,903.00
16. Operating Income	$1,942,727.00	$3,931,712.00
17. Int. during Constr.—Accrued	148,122.00	148,122.00
18. Adjusted Operating Income	$2,090,849.00	$4,079,834.00
19. Rate Base	$34,789,635.00	$34,789,635.00
20. Per cent Earned	6.01	11.73

NOTE.—The rate base above is the estimated average plant value for year 1923, plus working capital.

[fol. 39] Discussion

Without calculating any saving by virtue of the installation of machine switching, it is seen that the return under existing rates is approximately 6 per cent.

Whatever saving can be made through the machine switching program, which we feel soon will be substantial, will serve to increase the returns.

If income statements were prepared for several years past adjusted as above, they would show a fair rate of return.

VI

Existing Rates

Finding

We find that the existing rates are just, fair, reasonable and sufficient.

VII

Proposed Rates

Finding

We find that the proposed increased rates both toll and exchange, are unjust, unfair, unreasonable, and more than sufficient.

VIII

Decrease in Rates

Finding

The evidence does not justify any reduction in rates at this time.

IX

Reparation

Finding

The contention made by the City of Seattle for reparation is not supported by the facts or the law and that portion of the complaint should be dismissed.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of Seattle and the County Commissioners of King County, Washington filed

[fol. 40] with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the conclusions we have reached the petitions to reopen the case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceedings relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue the same is hereby dismised.

Discussion

This Department has had many disagreeable tasks to perform. During the war period the rising cost of labor and materials made it necessary for us to allow increased rates to many utilities to save them from bankruptcy. In almost every decision we held out a hope if not a promise that when conditions returned to normal and the period of inflation had pased rates would come down. Many utility rates have been reduced, some voluntarily and some by order of this Department, but now comes the respondents when we had dared hope that our predictions might be realized and ask for startling increases. We have sought to pursue a straightforward course doing justice to the utilities and the public regardless of popular clamor. During the war period the Postmaster General increased the rates of respondents during Federal control. These rates automatically expired and the former rates became revived by the return of the telephone lines to private ownership. Our predecessor, the Public Service Commission, permitted the refiling of the so-called Burleson rates upon one day's notice and they have been in effect ever since though the prices of materials and labor have steadily decreased. The commission was condemned by the press and public for permitting the continuance of these rates. The State of Oregon and other states refused to sanction the Burleson rates and the general telephone rate level has been higher in the State of Washington than in adjoining states until recently. We believe the commission acted wisely in continuing the so-called Burleson rates.

If we were convinced that the increases now sought by respondent were necessary and warranted by all facts we would permit them and submit to any censure that would follow with the patience that regulatory bodies must in the nature of things exhibit, but we are not so convinced.

Order

Wherefore it is ordered:

1. That the applications of respondents for increased rates be and the same are hereby denied. That the proposed increased rates in

[fol. 41] their entirety be and they are hereby permanently suspended; that the same shall not become effective, and existing rates shall remain in effect until the further order of the Department.

2. That the annual depreciation allowance be and the same is hereby fixed at 3½ per cent on the depreciable property of respondents for the period of two years beginning April 1, 1923.

3. That the compensation to be paid the American Telephone and Telegraph Company under said 4½ per cent contract shall hereafter be computed on the basis of 90 cents per station per annum on the average number of stations.

4. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be and the same is hereby dismissed.

5. That the portions of the complaints seeking reparation or reduced rates be and they are hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

The Department of Public Works of Washington, By E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation. Attest: J. H. Brown, Secretary.

EXHIBIT E TO BILL OF COMPLAINT

Dissenting Opinion

Cases Numbers 4902 and 5344

Dissenting Opinion

For the first time in our association as members of the Department of Public Works, of Washington, formerly the Public Service Commission of Washington, my associates and myself have been unable to agree upon a final order.

The majority opinion in this case contains conclusions upon certain fundamental principles of telephone rate regulation to which I cannot subscribe, and which are wholly at variance with my own conclusions.

In my opinion the record in this case fully sustains the conclusions which are expressed in the minority opinion filed herewith.

Dated at Olympia, Washington, March 31, 1923.

Hance H. Cleland, Supervisor of Public Utilities.

[fol. 42] BEFORE THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON, DIVISION OF PUBLIC UTILITIES

Nos. 4902 and 5344

THE DEPARTMENT OF PUBLIC WORKS OF WASHINGTON ex Rel. The City of Seattle, The City of Spokane, The City of Tacoma, Washington Hotel Men's Association, Seattle Chamber of Commerce, The Port of Seattle, King County, Washington, Tacoma Chamber of Commerce, Complainants,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY and HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, Respondents

THE PUBLIC SERVICE COMMISSION OF WASHINGTON, Complainant,

vs.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, Respondent.

Findings of Fact, Order, and Opinion

History of the Case

On October 29, 1921, the Department received from the King County Legislative Federation and the Women's Cicil Club of Seattle a petition wherein they requested an investigation and revision of the rates of the Pacific Telephone and Telegraph Company in Seattle and King County. Thereupon the Department advised them that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington, the holding of public hearings and the entry of written findings of fact and order, but that the Department would proceed to that end. Accordingly, after some preliminary preparation and on January 21, 1922, the Department prepared, filed and served its formal complaint challenging the reasonableness of the rates, rules, regulations and contracts of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane (the latter being an associate or subsidiary company of the Pacific Company).

The Department's Chief Engineer, H. J. Flagg, and its engineering and accounting staff, together with Mr. W. W. Hardinger, a consulting telephone engineer with twenty-seven years' experience in the construction, operation and engineering of independent telephone properties employed by the Department as a special engineer, were forthwith directed to proceed with and to make, in cooperation with engineers and acountants employed by the cities or other interested complainants, a thorough and complete analysis, investiga-

[fol. 43] tion and report on all matters which could and should be considered in a final determination of the matter before the Department.

Concurrently with the filing of the complaint, a letter, with a copy of the complaint enclosed, was directed to the mayor, council or commission and city attorney in each and every city and town in the state served by the two telephone companies mentioned, calling attention to the fact that the proceeding and investigation had been instituted, and, that it being a case of unusual magnitude, it was the desire of the Department that the city authorities and their local commercial and other public and civic bodies and organizations cooperate with us in this work, rendering such aid or assistance as possible. These letters and complaints were mailed to the authorities of more than one hundred cities and towns.

On March 3, 1922, the City of Seattle filed its complaint in this case with practically the same allegations as those found in the Department's complaint, except that, in addition thereto, the city prayed the issuance of a general reparation order on the ground that the existing rates were illegal. Subsequently and on or about March 31, 1922, the City of Seattle employed Mr. T. E. Phipps, an experienced rate and valuation engineer, with whom was associated in the preparation of this case, Mr. E. D. Ridley, a well qualified public utility auditor and accountant.

On or about October 1, 1922, the City of Spokane secured the services of Messrs. Hardinger and Ridley, above mentioned. These men, together with our own engineering and accounting staff, worked continously upon this investigation until the time of the hearing. The City of Tacoma made available for checking with our engineering staff, Messrs. Gray and Towne of its electrical department.

Mr. Ridley and Mr. L. P. Hockett, utility engineer and accountant for the Department, spent several months in San Francisco checking the books, records and accounts of the companies. A thorough check examination and survey was made in the State of Washington, particularly at Seattle, Spokane and Tacoma. In addition thereto a check and examination of the books, records and accounts of the American Telephone and Telegraph Company in New York and of various companies (including many independent telephone companies) in the reports and records of the Interstate Commerce Commission in Washington, D. C., was made.

On September 20, 1922, the respondent telephone companies filed with the Department exchange rate schedules, proposing revised increased rates applicable to all exchanges of those companies in the State of Washington.

On September 24, 1922, the Department issued its order suspending the effective date of these rates for the full statutory period and directing that the company file for the consideration of the Department a toll rate schedule conforming in principle with their pre-war toll rate schedule.

On September 28, 1922, the City of Spokane filed its complaint challenging the reasonableness and the legality of the proposed exchange rate schedule.

[fol. 44] On October 5, 1922, the telephone companies filed the toll rate schedule as directed, and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed exchange rate schedules, except as applied to the cities of Seattle, Spokane and Tacoma.

Subsequently, various complaints and letters were received by the Department relative to the proposed increase, comprising some seven hundred and fifty individuals, corporations and associations. To each of these a personal letter was addressed by the Department, enclosing a copy of the complaint and suspension order, calling attention to the investigation under way and inviting the writer of the letter or signer of the petition, to be present at hearings subsequen-ly to be held.

On December 14, 1922, the Washington Hotel Men's Association filed its complaint protesting the change proposed to be made by the companies in rates particularly applicable to hotels.

On December 18, 1922, after due notice to all parties, the first hearing in this case was held in the City of Olympia, at which time original evidence of all parties relative to matters of valuation was submitted and some cross-examination of the witnesses had. An adjournment was taken to January 22, 1923, at Spokane, January 24th at Seattle, and January 29th at Tacoma, at which times all witnesses who had testified on valuation were present for cross-examination upon the testimony given in the original hearing. Following the cross-examination of these witnesses, the telephone companies were required to submit proof in support of their proposed rate increases, and some cross-examination was had of these witnesses in each instance.

At the conclusion of the January hearings, an adjournment was again taken to February 23rd at Seattle, February 26th at Tacoma and February 28th at Spokane. At these latter hearings, all rate witnesses who had testified at the January hearings were present for cross-examination, and upon the conclusion of that cross-examination the cities, the Washington Hotel Men's Association and others offered their proof as opposing that of the companies, and the Department's chief engineer submitted a report embracing the results of the investigation made by himself and staff and the matter was then submitted for determination.

All hearings except the one held at Olympia, were held in the assembly room of the respective commercial clubs or chambers of commerce in each of the three cities, Seattle, Spokane and Tacoma, and in each instance the secretary of the chamber of commerce or commercial club was notified of the time and place of the hearing, and request made for the use of their assembly room.

In addition to the legal notices sent to the parties of record, the Department in each instance, without being required by law so to do, some ten days prior to each hearing, addressed seven hundred and fifty personal and individual notices to all parties who had addressed us by letter or petition upon the subject of telephone rates, calling their attention to the time and place of the hearing and

to the matters to be considered at that time and place. The greater [fol. 45] part of these notices were sent to business and professional men in the city of Seattle from whom the greater number of complaints had been received; and it may be interesting to note that although some 2,300 notices of hearings and personal letters were written to these complainants in the City of Seattle, there were (other than attorneys, engineers and accountants appearing directly for parties of record) only seven persons present at the Seattle hearing who offered any statement whatever upon the subject under investigation and consideration, and the only proof offered by these persons was a comparison between their monthly or yearly bills under the old rates and what their bills would be under the company's proposed rates. Of the number who received at least three direct and personal notices and communications concerning the investigation and hearings, many were members of the Seattle Chamber of Commerce namely one hundred and eight, and at least two were officers of that organization.

At the hearings in the cities of Tacoma and Spokane, some thirty-five or forty business and professional men appeared and showed the effect of the company's proposed rates in their individual cases.

At all of the hearings, each of the cities, Seattle, Tacoma and Spokane, was represented by its corporation counsel engineers and accountants.

The investigation and hearings in this case have been the most comprehensive ever made by the Public Service Commission or the Department of Public Works of Washington and have extended over a period of 14 months, during the greater part of which time the Department has been assisted by the engineers and accountants for the cities, who have worked in the spirit of close-t cooperation. The Department, through authority vested in it by law, has made available to all parties, all records, books, papers, documents, data and statistics found in the records of both companies, and has in all cases supplied the engineers and accountants for the cities with all data, records, etc., collected by it from all sources. In fact, the entire investigation and proceeding has been so conducted that (if we may take the liberty of quoting from an interview published in a Spokane paper) Mayor Charles A. Fleming and Corporation Counsel James M. Geraghty of Spokane, stated that they were much pleased with the showing made by the engineering experts employed by the state and the city in opposition to the proposed increase in telephone rates, and that the atmosphere prevailing was something entirely different from anything encountered in former hearings; that the officials of the State Department of Public Works showed a spirit of cooperation with Spokane and Seattle, and a determination to make a thorough investigation into the telephone situation before taking action.

From a careful consideration of the record and being advised as to the law, we enter the following findings of fact (with a discussion of each).

[fol. 46] Findings of Fact

1

Rate Base

Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Companies in the State of Washington, including the Spokane Exchange, used and useful in public service was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company v. Kuykendall, 119 Wash. 107.

Our discussion of the Spokane Exchange valuation has been fully covered in separate findings and order. On account of change of ownership of a portion of the property and the consolidation of two systems, the Spokane plant was of necessity treated as an original valuation proceeding.

As to the balance of the Pacific Company's plant in Washington, it is merely the bringing up to date of a valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922.

In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph "system." Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Company, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific system just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of a state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma.

Due consideration has been given to the items "Construction Work in Progress" and "Due from Subscribers and Agents," and we are of the opinion that these two items should properly be included in the rate base and in the amount above set out they have been so included.

The Public Service Commission of Washington, in its order in

Causes 1810-1825, placing a value for rate making purposes upon [fol. 47] the properties of the Pacific Telephone and Telegraph Company in the State of Washington, did not allow as an element of value the item of "Due from Subscribers and Agents." Investigation in the present case disclosed the fact that the amounts shown in the applicants' exhibits and in the report of the Department's engineer as "Due from Subscribers and Agents" represent balances due from subscribers and agents for services rendered previous to the dates as of which the balances were taken and do not contain any amounts representing advance billing. Such accounts receivable are a recognized element of value for rate making purposes and it has always been the practice of this Department to treat them as such. There appears to be no reason for it to depart from its practice in this case.

Some contention was made during the course of the hearing relative to the exclusion of certain properties from the rate base, particularly in Seattle where a large development has been made by the Pacific Company during the past few years. This property is covered by the account "Construction Work in Progress" which, being a balance sheet account is not ordinarily grouped with the fixed capital accounts in arriving at a rate base. It is our opinion, enlarged on in the following discussion, that "Construction Work in Progress" should be included in the rate base.

The Department's engineers, in the first volume of their report, dealing with the rate base, contended that "Construction Work in Progress" should not be included in the rate base, giving as a reason the fact that a utility is permitted to capitalize interest upon funds employed in construction work and that to include "Construction Work in Progress" in the rate base would make possible a double earning during the construction period upon the same investment. In the second volume of their report, the Department's engineers modified their position to the point of including "Construction Work in Progress" in the rate base but, as a compensating factor, including in operating income the interest accrued during the construction period. The reasons for their change of position, as stated on pages 5 and 6 of volume two of their report, are as follows:

"A review of the evidence received at the first hearing in the present case, concerning the proper treatment of construction work in progress, has led to the conclusion that the extreme views as to this factor have been presented by the company on one hand and by the Department's engineers on the other. Construction work in progress was included in the rate base by the company, and excluded from the rate base by the Department's engineers, without consideration having been given by either to all of the facts which it is believed are pertinent to a consideration of the ultimate effect upon the rate base and upon operating income. Under the method proposed by the company, no consideration is given to the interest earnings of funds employed in construction work in progress; while, under the method first proposed by the Department's engineers, consideration was not given to the fact that, if the company were not

permitted to earn on funds employed in construction work, it must be [fol. 48] permitted to capitalize interest during the entire construction period between the initiation of the work and the date of its actually coming into service. The effect of this, particularly in the case of Seattle, where an extremely large construction program is now being carried on, would be to pyramid the rate base and add to the burden of the rate payer during the entire future life of the plant."

Funds employed in construction work are as fully devoted to the public service as are funds invested in completed plant, in materials and supplies, or in the case required to meet current expenditures. The necessity of an allowance for cash, materials and supplies, and other items of working capital, is recognized by all regulatory bodies and there is no question as to the properiety of permitting an earning upon these items in their final form when they appear as additions to the fixed capital accounts. Since "construction work in progress" represents nothing more nor less than cash and materials and supplies in their transitional stage between working capital and completed plant, it seems as clearly entitled to inclusion in the rate base as it was as working capital or as it will be as completed plant.

There is, however, a further factor in this consideration, which is "Interest during Construction." Certainly, funds employed in construction work are entitled to a fair earning. If the funds be borrowed, the creditor is receiving an earning and the utility is suffering no loss since it is permitted to capitalize the interest it pays out. This capitalization creates a value upon which the utility is permitted to earn and which presumably can be sold if the plant changes owners. If the utility capitalizes interest on its own funds there is an actual increase in its surplus. These facts must be recognized when considering the propriety of including "Construction Work in Progress" in the rate base.

The rate of return from operations seldom coincides with the rate at which interest during construction is capitalized; furthermore, the applicant does not capitalize interest upon routine construction work requiring less than one month for completion. Therefore, the most equitable method of treatment appears to be to include "Construction Work in Progress" in the rate base and to include in operating income the interest accretions which act as an automatic governor to compensate the rate payer, if the rate of capitalization of interest be more, and the company if it be less, than the rate of return from operations.

II

Rate of Return—(Earnings)

Findings

That under the rates applicable during the past seven years the Pacific Telephone and Telegraph Company in the State of Washington, after paying operating expenses, taxes, licensee revenue, debtor,

[fol. 49] and setting aside depreciation, has shown an annual rate of return as follows:

1915	1916	1917	1918	1919	1920	1921	1-1 to 6-30-22
1.84%	3.40%	3.31%	3.13%	4.67%	4.09%	3.52%	3.35% (annual)

and that said rate of return during the entire period has been unfair, unjust, unreasonable and less than sufficient.

That the estimated rate of return of the Pacific Telephone and Telegraph Company for the State of Washington for the year 1923 under the rate proposed by the companies, computed upon the rate base herein found, will be 9.04%, which would be unjust, unfair, unreasonable and more than sufficient.

That under the rates fixed and allowed by this order, the rate of return will be 7.37 per cent upon the rate base herein established.

Discussion

It has been a consistent policy of the present members of this Department in all rate cases, where satisfactory service was shown to have been given, to allow a rate of return approximately 8% upon the value or rate base as fixed and determined by the Department. It is admitted by counsel for the City of Seattle that the service is satisfactory. The only direct testimony upon this subject was that of a witness for the City of Seattle, who stated that 8% was a fair rate of return upon money invested in telephone plant. As testified on cross-examination by certain witnesses (telephone users) for the City of Tacoma, a rate of return ranging from 6% to 10% was by them deemed reasonable, should they invest their money, depending upon the nature or class of business in which the investment was made.

For convenience of study, and to make the manner and method of computation clear, there is here inserted an income statement for the years 1920, 1921, and the first six months of 1922. We will define and discuss each of the items therein. The numbers refer to the corresponding account title on the statement.

[fol. 50] Statement of Operating Income and Rate of Return, Pacific System, State of Washington

	1920	1921	January 1 to June 30, 1922
1. Telephone Operating Revenues	$7,754,052.82	$8,114,245.13	$4,165,420.49
Deductions from Revenues:			
2. Telephone Operating Expenses (Excl. Dep.)	4,716,709.05	5,043,458.88	2,573,994.76
3. Taxes Assignable to Operations	600,045.53	543,449.27	262,310.90
4. Uncollectible Operating Revenues	17,321.26	29,028.68	17,061.75
5. Depreciation (on Depreciable property)	1,177,558.87	1,321,585.78	727,295.13
6. Licensee Revenue—Dr.	327,106.58	342,658.03	173,421.04
7. Total Deductions from Revenue	$6,838,741.29	$7,280,180.64	$3,754,083.58
8. Operating Income	915,311.53	834,064.49	411,336.91
9. Interest during Construction	17,959.48	90,491.52	97,965.71
10. Adjusted Operating Income	$933,271.01	$924,556.01	$509,302.62
11. Rate Base (Incl. C. I. P.)	$22,821,159.54	$26,232,691.37	$30,425,113.89
12. Rate of Return	4.09%	3.52%	3.35%

NOTE.—Line 11—Amounts are average for the period, hence do not agree with rate base finding since the latter is of a specific date, namely June 30, 1922.

[fol. 51] 1. Telephone Operating Revenues.—This is the total annual revenue arising from the conduct of the telephone business. From this amount, and before any balance is available for the payment of dividends or interest on bonds or other obligations, there is properly deductible Items 2, 3, 4, 5 and 6.

2. Telephone Operating Expenses (Excluding Depreciation).—This item includes salaries, wages, materials, and all other expenses of operating a telephone plant, except those covered by Items 3, 4, 5 and 6. No interest of any kind is included in any of the items deductible from Telephone Operating Revenues.

3. Taxes Assignable to Operations.—This item includes all federal, state, county and municipal taxes paid by the telephone company.

The Department has heretofore consistently refused the allowance of income tax in all utility matters coming before it. However, in view of recent decisions of the Supreme Court of the United States, federal courts and the Interstate Commerce Commission, we are constrained to reverse our former holding and practice in this regard, and to follow the law as definitely settled by the courts, which is, that federal income tax is properly deductible from operating revenues.

Consolidated Gas Company of New York v. Newton, 267 Federal 231.
Newton v. Consolidated Gas Company, 42 Sup. Ct. 264.
Galveston Electric Company v. Galveston, 66 Law Ed. 382.
Reduced Rates 1922—I. C. C. 683.

4. Uncollectible Operating Revenue.—This item includes the charges for telephone and other services, which, after a reasonably diligent effort to collect, have proved impracticable of collection. Only uncollectible bills for amounts which have been treated as operating revenues (see above) are included in this account.

5. Depreciation (on Depreciable Property).—Under the system of accounts prescribed by the Interstate Commerce Commission and adopted by the Department of Public Works, telephone companies operating in the State of Washington are required to establish and include in their yearly and monthly operating expenses, a charge sufficient to cover depreciation of plant due to wear and tear, obsolescence, inadequacy, public demand, extraordinary accidents, catastrophies, etc. These charges are carried to a depreciation reserve, and the costs of all replacements of plant units, instead of being included in the ordinary repairs accounts, are charged against the depreciation reserve. Owing to the fact that the annual depreciation charge must be estimated, there naturally have been some slight differences of opinion as to just how this annual charge should be estimated, and just about what percentage of plant cost it should be. It is apparent that while the percentage necessary in the case of one exchange may vary to some extent from the percentage [fol. 52] necessary in the case of another exchange, due to a possible

difference in the character of the physical property contained in each; yet at the same time, there should be no material differences in the annual charges necessary for large telephone systems, involving a number of exchanges, large and small, in different portions of the state, where climatic and other conditions are not the same.

The question here involved and to be determined, is as to what reasonable annual percentage should be allowed for depreciation of respondent's plant in this state.

In computing the rate of return, in all statements found herein, annual depreciation has been allowed at a percentage of 5.25%.

The subject of depreciation was covered fully by witnesses for the companies, for the Department and for the City of Seattle, and the percentages recommended by each were as follows:

Companies	5.75%
City of Seattle	5.88% (exchange plant only).
Department's Engs.	5.25%

In Case No. 4747, Public Service Commission of Washington et al. v. Pacific Telephone and Telegraph Company, decided February 13, 1919, the Public Service Commission of this state approved depreciation for the company at an annual percentage of 5.72%, and 5.72% was the percentage allowed by agreement with the Federal Government during the period of Federal control of the telephone systems of the United States.

In addition to our finding of depreciation at 5.72% in Case No. 4747, depreciation percentages were allowed by us in the following cases:

Cause No. 5040, City of Port Angeles v. Angeles Telephone and Telegraph Company, Nov. 17, 1920, 5.72%.

Cause No. 5076, Camas Commercial Club v. Camas Telephone and Telegraph Company, February 1, 1921, depreciation allowed 6%.

Cause No. 5127, Commission v. Oregon-Washington Telephone Company, January 4, 1921, rate not stated in order, but 5.72% found in working papers.

There is included herein a tabulation of decisions on depreciation by commissions and courts. There are 112 commission decisions and eight court decisions.

It is found from an analysis of these decisions that the rates for depreciation fixed by the regulatory bodies generally were considered to apply to the property as a whole, either to the total actual cost or the total reproduction cost, or to the total value. The percentages allowed range from a minimum of 2.29% to a mixiumum of 10%. In twelve of the cases, the allowance was below 5%; in fifty cases the percentage was from 5% to 6%; in forty cases the percentage was from 6% to 7%, while in ten cases the allowance in excess of 7%. The average allowance was 9.972%. It will also be noted that in ninety of the 112 cases reported, the depreciation allowance fell between 5% and 7%.

[fol. 53] Tabulation of Cases on Depreciation

Jurisdiction	Citation		Rate fixed
Alabama	PUR1919B	791	5.50
Arizona	PUR1920	411	6.00
Arkansas	PUR1921	516	6.40
California	PUR1915F	1014	5.50
California	PUR1922A	853	5.50
California	PUR1922C	97	3.28
Colorado	PUR1917B	198	5.65
Georgia	PUR1921C	833	5.11
Hawaii	PUR1921B	209	6.80
Idaho	PUR1916C	438	6.07
Idaho	PUR1920E	821	6.00
Illinois	PUR1915D	646	5.00
Illinois	PUR1916B	318	7.00
Illinois	PUR1916D	781	6.58
Illinois	PUR1917A	658	6.00
Illinois	PUR1917B	368	6.00
Illinois	PUR1918B	172	5.50
Illinois	PUR1918E	74	5.50
Illinois	PUR1915E	23	5.00
Indiana	PUR1917F	209	4.50
Indiana	PUR1918C	489	5.00
Indiana	PUR1918E	859	5.00
Indiana	PUR1918E	669	5.00
Indiana	PUR1920C	209	5.00
Indiana	PUR1920C	854	5.50
Indiana	PUR1919E	504	5.00
Indiana	PUR1920A	422	5.00
Indiana	PUR1920B	813	5.00
Indiana	PUR1920D	83	5.00
Indiana	PUR1922E	46	5.00
Kansas	PUR1915B	507	6.00
Kansas	PUR1918C	55	6.50
Kansas	PUR1918C	777	5.72
Kansas	PUR1922A	321	4.36
Louisiana	PUR1922E	86	5.00
Maine	PUR1920C	386	3.32
Maryland	PUR1916C	925	6.25
Michigan	PUR1921C	545	5.00
Michigan	PUR1921E	308	5.00
Michigan	PUR1923A	30	4.00
Minnesota	PUR1916C	141	8.94
Minnesota	PUR1921C	733	4.50
Missouri	PUR1915C	366	6.50
Missouri	PUR1920E	59	7.00
Missouri	PUR1919A	659	5.50
Missouri	PUR1922A	773	6.00

[fol. 54] Tabulation of Cases on Depreciation—Continued

Jurisdiction	Citation		Rate fixed
Nebraska	PUR1915E	57	6.00
Nebraska	PUR1919A	35	6.00
New Hampshire	PUR1918F	592	7.00
New York	PUR1916B	940	5.80
New York	PUR1920D	529	5.66
North Dakota	PUR1921E	567	6.00
North Dakota	PUR1922E	602	5.00
Ohio	PUR1922A	155	5.00
Oregon	PUR1915F	290	2.39
Oregon	PUR1919D	345	3.55
South Dakota	PUR1915A	562	7.00
South Dakota	PUR1915B	223	7.00
South Dakota	PUR1915E	516	6.00
South Dakota	PUT1916A	364	7.00
South Dakota	PUR1916D	603	6.00
South Dakota	PUR1919B	734	7.00
South Dakota	PUR1922D	769	4.00
Utah	PUR1918C	566	6.50
Virginia	PUR1922A	756	5.50
West Virginia	PUR1921B	97	6.10
Wisconsin	2WRCR	105	3.67
Wisconsin	2WRCR	358	8.00
Wisconsin	2WRCR	427	10.00
Wisconsin	2WRCR	546	7.00
Wisconsin	3WRCR	117	8.00
Wisconsin	3WRCR	412	8.00
Wisconsin	3WRCR	452	8.00
Wisconsin	4WRCR	1	8.00
Wisconsin	4WRCR	259	7.50
Wisconsin	4WRCR	370	7.00
Wisconsin	4WRCR	407	7.00
Wisconsin	4WRCR	414	7.00
Wisconsin	6WRCR	211	8.00
Wisconsin	6WRCR	419	6.50
Wisconsin	6WRCR	549	6.50
Wisconsin	6WRCR	573	6.50
Wisconsin	7WRCR	428	7.00
Wisconsin	7WRCR	608	7.00
Wisconsin	8WRCR	92	6.50
Wisconsin	9WRCR	383	6.50
Wisconsin	9WRCR	489	6.07
Wisconsin	11WRCR	180	6.50
Wisconsin	11WRCR	402	7.00
Wisconsin	11WRCR	499	6.50
Wisconsin	11WRCR	666	6.52
Wisconsin	13WRCR	540	6.50

[fol. 55] Tabulation of Cases on Depreciation—Continued

Jurisdiction	Citation		Rate fixed
Wisconsin	14WRCR	157	7.00
Wisconsin	14WRCR	594	6.50
Wisconsin	15WRCR	182	9.00
Wisconsin	15WRCR	552	7.00
Wisconsin	16WRCR	402	6.67
Wisconsin	16WRCR	473	6.50
Wisconsin	16WRCR	758	7.00
Wisconsin	PUR1916C	1020	5.00
Wisconsin	PUR1916D	631	5.50
Wisconsin	PUR1917A	439	5.17
Wisconsin	PUR1917C	507	5.50
Wisconsin	PUR1917E	540	6.00
Wisconsin	PUR1919D	909	6.00
Wisconsin	PUR1920C	1019	6.00
Wisconsin	PUR1921E	171	4.58
Wisconsin	PUR1922A	164	6.00
Wisconsin	PUR1922B	91	5.00
Wisconsin	PUR1919F	92	5.21
Wisconsin	PUR1922B	553	3.50
Wisconsin	PUR1922D	368	5.00

The following court decisions also discuss the matter at some length:

Pioneer Telephone Company, Oklahoma, 118 Pac. 363.
Railroad Company v. Richmond, 96 U. S. 521.
Munn v. Illinois, 94 U. S. 133.
Cumberland Telephone and Telegraph Company v. Louisville 187 Federal 637.
Cumberland Telephone and Telegraph Company v. Memphis 183 Federal 875.
Cumberland Telephone and Telegraph Company v. Railroad Commission, 156 Federal 823.
Gome Telephone and Telegraph Company v. Carthage, 139 S. W. 547.
Bell Telephone Company v. Houston, Texas, P. U. R. 192D, 793.

6. Licensee Revenue Debtor (4½% Contract).—

This is a contract between the American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company, and the Home Telephone and Telegraph Company at Spokane, whereby the Pacific Company and the Home Company pay to the American Company four and one-half per cent of the gross revenue from four principal classes of service, namely: 1st, Subscribers' Station Revenues; 2nd, Public Pay Station Revenues; 3rd, Private Exchange [fol. 56] Line Revenues, and 4th, Message Toll Revenues; less Un-

collectible Operating Revenues. The total amount paid by the Pacific Company and the Home Company under this contract in the year 1921 was $342,658.03. The consideration for this payment is that the American Telephone and Telegraph Company supplies at all times to the Pacific Company and the Home Company certain instrumentalities, services, etc. These instrumentalities and services may be briefly designated as follows:

1. Telephone transmitters, receivers and induction coils.

2. Rights under all patents owned or controlled by the American Company covering use of telephonic devices, apparatus, methods and systems.

3. The right to use all standardized, new and improved apparatus and methods developed through research and experimental work by the American Company.

4. A guarantee of freedom from royalties, damages and expenses on account of patents arising out of recommended use of apparatus, methods and systems.

5. An organization to prosecute continuously the fundamental work of research and investigation to the end that safety, economy and efficiency in the business will be promoted.

6. Advice and assistance in general engineering plant, traffic, operating, commercial, accounting, patent, legal, administrative and other methods involved in the efficient, economical and successful conduct of the telephone business.

7. Advice and assistance in the financing necessary to develop and enlarge the plants of the Pacific and the Home Companies.

8. Assistance, co-operation and support in promoting the health and welfare of the employes, including the plan for employes' pensions, disability benefits and death benefits with a provision for guaranteeing the integrity of the funds provided by the Pacific and Home companies for this purpose.

Instrument Service (Receivers, Transmitters, and Induction Coils).—It is conceded in this case, by all parties, that, should the only service performed by the American Company be the so-called instrument service, the annual charges therefor which might properly be allowed as a deduction from revenue would be in excess of 53 per cent of the total amount paid by respondents to the American Company under the four an- one-half per cent contract. This particular item is referred to in the record and the briefs as "instrument service."

Other Services.—In our opinion, the cost to the Pacific Company and the Home Company of the other items of service, etc., rendered by the American Company to them would greatly exceed the other 47 per cent of the amount paid under contract. It is our opinion [fol. 57] that the value of the services rendered by the American Company exceeds the amount paid therefor, and we, accordingly, al-

low the full amount charged therefor as a deduction from revenue. However, it is also our opinion that the method used in computing the compensation to be paid for these services is not correct in principle. As it is now a revision of rates resulting in a change in revenue brings about a corresponding change in the amount in dollars to be paid under the contract. In other words, having found that four and one-half per cent of certain gross revenues under existing rates is just and equitable, it can not logically be said that four and one-half per cent of the revenues derived from increased rates is also fair without some showing of additional facilities furnished or services rendered by the American Company. We believe that a method of computing the payments under the contract which will not be influenced proportionately by changes in operating revenues can be found. Such a method would be more equitable and less objectionable than the present flat percentage method. We are, therefore, adopting a method of determining the amount of compensation which should be paid, which we believe will accomplish that end and at the same time be fair to the companies and to their patrons. Naturally, as an exchange or a plant increases there will be a greater demand for instrumentalities and service and this demand will grow as the size and importance of the exchange increases or grows. Therefore, in our opinion, the only fair and logical method of fixing and standardizing this compensation is upon a per station basis. We believe that the present compensation in dollars is reasonable for the service rendered and should be approved. Dividing the contract payment for 1922 by the average number of exchange stations served by respondents a figure of $2.15 per station is derived. Therefore in this case the amount of compensation for services performed under this contract that is approved as a deduction from revenue is computed at the rate of $2.15 per exchange station. The total approved allowance for this compensation is not changed by the increase in rates allowed.

The four and one-half per cent contract has been the subject of investigation by practically every public service commission or similar regulatory body in the United States, and it is of interest to note that the full four and one-half per cent has been allowed by twenty-one commissions, and that the amount has been reduced by only seven commissions. Ten state commissions have not only allowed the full amount under the contract but have approved the percentage method of computing compensation. Eleven states, although they have allowed the full amount, have not approved the percentage method.

The contract has been the subject of exhaustive investigation by the Public Service Commission of this state as far back as the year 1912 and we have in our files as a result of the first investigation two volumes of some 540 pages of testimony and exhibits relating thereto. At that time two members of the Public Service Commission of this state held an inquiry in New York City, the home office [fol. 58] of the American Telephone and Telegraph Company, and inquired into every conceivable angle of the subject.

This matter was before the Public Service Commission of this state in our Cause No. 4747 Public Service Commission, et al. v. Pacific Telephone and Telegraph Company and the Postmaster General, and in the decision (1919 annual report, page 168) we find the following:

"At a large expense this Commission several years ago made a thorough investigation of this contract, but at that time entered no order concerning it. We have reached the conclusion that it is a beneficial arrangement conducive to telephonic development and service. A number of other state commissions have analyzed and discussed it and in the main have supported it."

And again in that same order, we find the following:

"Between the Bell system and its constituent companies there has for many years existed what is known as the four and one-half per cent (4½%) contract. This contract is recognized and made a part of the agreement between the Bell System and the constituent companies joining and the Postmaster General."

The Supreme Court of the United States, in City of Houston v. Southwestern Bell Telephone Company, and Southwestern Bell Telephone Co. v. City of Houston et al., U. S. Supreme Court Advance Opinions 1921-1922, No. 16, July 1, 1922, p. 539, stated:

"The American Telephone and Telegraph Company owns substantially all of the stock of the Company and a large majority of the stock of the Western Electric Company. From the American Telephone and Telegraph Company the Company leases its instruments and secures their maintenance and renewal, and from the Western Electric Company it obtains the greater part of its equipment and supplies used in operating its local exchange. It is contended by the City that no fair disclosure was made of the profits made by the furnishing companies on the instruments and on the material and supplies so furnished, and that, for this unique reason, the Company should not be heard in a court of equity and the case should be dismissed. It is true that the Company did not introduce proof to show what the profits of the two companies were, either upon the business done with it or on their entire business; but it did introduce much evidence tending to show that the charge made and allowed for the services rendered and supplies furnished by them was reasonable and less than the same could be obtained for from other sources. Under the circumstances disclosed in the evidence, the fact that the American Telephone and Telegraph Company controlled the Company and the Western Electric Company by stock ownership is not important beyond requiring close scrutiny of their dealings to prevent imposition upon the community served by the Company, but the Court recognized and applied this rule."

Although there are many Commission decisions, whereby the four [fol. 59] and one-half per cent contract is discussed in detail, and

approved, as above indicated, we think it necessary to quote from only one of these decisions, as bearing upon the reasonableness of the compensation paid for the services rendered.

We quote from a decision of the Commission of the State of Alabama, City of Birmingham v. Southern Bell Telephone Co., 84 Commission Leaflet No. 1 (1918):

"The development of the general staff of the American Telephone and Telegraph Company has so grown, and its functions so broadened, that at the present time it renders available to the respondent company"—(The respondent company was in the position of the Pacific and Home companies here)—"the entire telephone experience of the world, with everything that is of general value in the telephone art and sciences, whether covered by patents or not. It is plain to the Commission that it is absolutely necessary for the respondent company to keep in touch at all times with all improvements in the telephone arts and sciences, and whether it does this through contract with the American Telephone and Telegraph Company, or through its own efforts, the Commission is not concerned.

"The Commission is naturally interested as to whether the respondent company could get this service cheaper in some other way, either by furnishing it itself, or by some other source. It is obvious that much of this service could not be obtained any other way except in a central organization. It would be impossible to render to every one all of the patent inventions which so largely make up the improvements in the arts of telephony. If each telephone company attempted to organize a general staff, it appears to the Commission that each company would absolutely retain its own inventions, and no company could acquire the right to use everything that will aid in the most efficient and economical service. Moreover, the expense of such organization, it occurs to the Commission, would be prohibitive, unless it were distributed over a large system.

"The fact, if it be a fact, that this arrangement or contract is also a desirable contract from the standpoint of the American Telephone and Telegraph Company does not, to the mind of this Commission, affect the situation whatsoever. This is ordinarily true, of course, of all such contracts. If, for instance, the respondent company rented its instruments from some one else, the person who rented them to the company would expect a profit, and would certainly be entitled to one. Sound business transactions benefit all parties to them."

7. Total Deductions from Revenue.—This is the total of items 2, 3, 4, 5 and 6 and comprises all expenditures reasonably deductible from revenue in computing a rate of return.

8. Operating Income.—This is the residue of operating revenue remaining after paying all expenses of operation except interest and dividends. It is obtained by subtracting Item 7 from Item 1.

[fol. 60] 9. Interest During Construction.—This item comprises the accruals of interest on moneys expended on construction work in progress and is computed on the monthly balances in that account.

It is added to Item 8 as an offsetting factor for the inclusion of Construction Work in Progress in the rate base.

10. Adjusted Operating Income.—This item is merely the sum of items 8 and 9.

11. Rate Base.—This item is the amount in dollars upon which the utility is entitled to earn a reasonable return. It is derived from the rate base figure in Finding I. The amounts stated herein are averages figures for the period and do not represent the rate base as of any specific date.

12. Rate of Return.—This item is the percentage obtained by dividing the Adjusted Operating Income by the Rate Base. It is analogous to an interest rate and represents the percentage earning or interest on the rate base.

III

Hotel Rates

Finding

The rates proposed by the respondent applicable to hotels are in our opinion unjust, unfair and unreasonable for service rendered, and the same will be disallowed. Just, fair, reasonable and sufficient rates for this service are included in the rate schedule herein set forth.

IV

Toll Message Rates

Finding

The charges for toll messages now made by the respondeent are unjust, unfair, unreasonable, and less than sufficient. The respondent Pacific Company should therefore file a revised toll rate schedule in accordance with the following specifications:

1. The classes of service at present being given to be continued.

2. The distances or base rates on each intrastate route to remain unchanged.

3. In all other respects the revised toll rate schedule, rules and regulations, shall be similar to the present tariff now in effect with the following exceptions:

a. The initial period for all station to station intrastate messages shall be three minutes, and the charge for each additional minute or fraction thereof shall be one-third of the initial rate.

[fol. 61] b. The initial period for all person to person, messenger and appointment intrastate messages shall be two minutes and the

charge for each additional minute or fraction thereof shall be one-half of the initial rate.

c. If the initial rate for station to station messages is not evenly divisible by three, the charge for each additional minute or fraction thereof for this classification shall be calculated to the next lower multiple of five cents.

d. If the initial rate for person to person, messenger or appointment calls is not evenly divisible by two, the charge for each additional minute or fraction thereof for these classifications shall be calculated to the next lower multiple of five cents.

Discussion

As stated in our order suspending the company's proposed rates we have reached certain conclusions which we consider more or less fundamental in connection with the rate structure of telephone utilities.

a. From facts thus far developed the Department is inclined to the view that property used and useful devoted to the service of the public should be considered as a whole and the rate schedule so designed as to produce a reasonable return on a reasonable value of the property as a whole, provided that no form of tariff or system of grouping, or segregation, should be adopted that will unduly favor any community or class of communities, to the disadvantage of others.

b. That the toll or long distance rate schedules should be in keeping with the competitive conditions to be met and with due regard to the value of the service rendered, to the end that the local exchange rate schedules, which intimately touch the lives of all of the people of this state and which are a domestic necessity, should be as low as possible.

The changes above directed in the toll schedule will accomplish the result contemplated by the Department in its suspension order.

V

Exchange Rates

Finding

The existing exchange rates and charges of the respondents are unjust, unfair, unreasonable and less than sufficient. The exchange rates proposed by the respondents in their respective tariffs W. D. P. W. No. 3, are unjust, unfair, unreasonable and more than sufficient. The exchange rates as set out on succeeding pages herein are just, fair, reasonable and sufficient.

[fol. 62] That the respondents should file with this Department tariffs containing the schedule of rates herein found to be just, fair,

reasonable and sufficient, but containing in all other respects the same rates, rules and regulations as are contained in their respective exchange rate schedules, W. D. P. W. No. 3, now on file with the Department and under suspension.

That had said rates been in effect during the entire calendar year of 1923, the Pacific system in the State of Washington would have realized a rate of return of 7.34 per cent, as computed on the estimated rate base for that year of $34,789,635.00, which rate of return is just, fair, reasonable and not more than sufficient.

Rates

Seattle Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$10.50	$10.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$6.50	$6.75	130	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$4.25	$4.50
Two-party Line	3.50	3.75
Four-party Line	2.75	3.00
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c. per month additional.

[fol. 63]

Rates

Tacoma Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.00	$8.25
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.50	$3.75
Two-party Line	2.75	3.00
Four-party Line	2.25	2.50
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c per month additional.

Rates

Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

[fol. 64]

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	....

Semi-Public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$ .20	*	$ .05

	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2 75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c per month additional.

Hotel Private Branch Exchange Service Rates

Seattle, Tacoma, and Spokane Exchanges

Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type:	
10 lines or less in use	5.00
11– 30 lines in use	6.00
31– 60 lines in use	7.00
61–100 lines in use	8.00
101–150 lines in use	9.00
151–200 lines in use	10.00
201–260 lines in use	11.00
261–320 lines in use	13.00
[fol. 63] **Multiple Cord Type:**	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Seattle	Tacoma	Spokane
Each station not in guest room, without dial—			
Wall set	$1.25	$0.95	$1.00
Desk set	1.50	1.20	1.25
Each station not in guest room, without dial—			
Wall set	1.50	1.15	1.20
Desk set	1.75	1.40	1.45
Each station in guest room, without dial—			
Wall set	.75	.55	.60
Desk set	1.00	.80	.85
Each station in guest room, with dial—			
Wall set	1.00	.75	.80
Desk set	1.25	1.00	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk Lines to central office from switchboard or order boards—
Each bothway trunk line—Individual Line business rate plus $3.00
Each incoming trunk line.....Individual Line business rate

Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[fol. 66] Statement of Operating Income and Rate of Return

Estimate for the Year 1923

	Present rates	Company proposed rates	Department allowed rates
1. Operating Revenues	$9,300,441.00	$11,474,615.00	$10,751,350.00
Deductions from Revenues:			
2. Operating Expenses (excl. Depreciation)	5,603,889.00	5,603,889.00	5,603,889.00
3. Taxes Assignable to Operations	581,000.00	658,057.00	637,413.00
4. Uncollectible Revenues	35,618.00	48,367.00	44,445.00
5. Depreciation (on Depreciable Property)	1,674,024.00	1,674,024.00	1,674,024.00
6. Licensee Revenue—Dr.	386,170.00	386,170.00	386,170.00
7. Total Deductions from Revenues	$8,280,701.00	$8,370,507.00	$8,345,941.00
8. Operating Income	$1,019,740.00	$3,104,108.00	$2,405,409.00
9. Interest during Construction	148,122.00	148,122.00	148,122.00
10. Adjusted Operating Income	$1,167,862.00	$3,252,230.00	$2,553,531.00
11. Rate Base (including Const. Work in Progress)	$34,789,635.00	$34,789,635.00	$34,789,635.00
12. Rate of Return	3.36%	9.35%	7.34%

[fol. 67] Farmer Line Rates

Finding No. VI

We find that irregularities and discrimination exist in the rates now being charged by respondent for farmer line service. In order to equalize and standardize these rates the respondent should file a supplement to its tariff effective on and after April 1, 1923, carrying the following schedule of charges:

Where the number of exchange station is	The annual farmer line rate shall be
Over 20,000	$15.00
10,000 to 20,000	11.00
5,000 to 10,000	8.00
3,000 to 5,000	6.00
2,000 to 3,000	5.00
1,000 to 2,000	4.00
500 to 1,000	3.00
Under 500	3.00

Reparation

Finding No. VII

The contention made by the City of Seattle relative to the validity of the present rates of the company and their prayer for a general reparation order is not supported by the facts or the law, and that portion of the complaint should therefore be dismissed.

Discussion

The existing rates of the Pacific Telephone and Telegraph Company were first established during the period of Federal control, and inasmuch as there existed a doubt as to the validity and legality of rates established during that period being legally continued without some affirmative action on the part of the Commission, the Pacific Telephone and Telegraph Company at the conclusion of Federal control refiled with the Commission the same schedule of rates and the Public Service Commission entered an affirmative order permitting the same to become effective on less than statutory notice.

We find nothing in the record which would lead us to any conclusion except that the rates now in effect are and have been since the conclusion of Federal control the only legal and valid rates applicable during that period.

Petitions to Reopen Case

Some two weeks subsequent to the conclusion of all of the hearings in this case, the Seattle Chamber of Commerce, the Port of

Seattle and the County Commissioners of King County, Washington, [fol. 68] filed with the Department petitions requesting the reopening of this case. The time for the suspension of the proposed increase in rates in this case expires on April 1, 1923.

In view of the foregoing statements relative to procedure notice, etc., the wide newspaper publicity given the matter periodically since the latter part of the year 1921, and in the absence of a showing warranting the same (the matters in the petition pertinent to the issues having been fully covered by the investigation and reports) petitions for the reopening of this case will be denied.

Dismissal of Cause No. 4902

Cause No. 4902 entitled The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company is an old proceeding relating to facilities and service of respondent in the City of Seattle. There being no reason for continuing the same upon our docket, the matters and things therein alleged being no longer an issue, the same is hereby dismissed.

Order

It is hereby ordered:

1. That the respondents, Pacific Telephone and Telegraph Company and Home Telephone and Telegraph Company of Spokane, file with this Department within fifteen (15) days from the date of service of this order, tariffs or supplements to their respective tariffs in conformity with the findings of fact and directions herein contained; and that all rates, rules and regulations as amended or supplemented as herein found and ordered be, and they are hereby, made effective as of April 1st, 1923.

2. That Cause No. 4902 entitled "The Public Service Commission of Washington v. The Pacific Telephone and Telegraph Company" be, and the same is hereby dismissed.

Witness The Department of Public Works of Washington this 31st day of March, 1923.

Department of Public Works of Washington, By —— ——, Director. Hance H. Cleland, Supervisor of Public Utilities. —— ——, Supervisor of Transportation. Attest: —— ——, Secretary.

[fol. 69] EXHIBIT "F" TO BILL OF COMPLAINT

The Home Telephone and Telegraph Company of Spokane

Exchange Rates, Spokane, Washington, set out in Dissenting Opinion of Hance H. Cleland, Supervisor of Public Utilities, State of Washington, in Case Numbers 4902 and 5344

Spokane Exchange

Business—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$8.50	$8.75
Extension (with or without bell)	1.00	1.25
Suburban Service—Ten-party Line	3.50	3.75

Business—Measured Service

	Rate per month		Free exch. messages per month	Each additional exchange message
	Wall set	Desk set		
Individual Line	$5.50	$5.75	110	$.05
Extension (with or without bell)	.75	1.00	...	...

Semi-public Coin Box Service

	Rate per day		Each exchange message
	Wall set	Desk set	
Individual Line	$.20	*	$.05

	Rate per month	
	Wall set	Desk set
Extension (with or without bell) per month	$1.00	$1.25

Residence—Unlimited Service

	Rate per month	
	Wall set	Desk set
Individual Line	$3.75	$4.00
Two-party Line	3.00	3.25
Four-party Line	2.50	2.75
Extension (with or without bell)	.75	1.00
Suburban—Ten-party Service	3.00	3.25

*25c. per month additional.

[fol. 70] Hotel Private Branch Exchange Service Rates

Spokane Exchange

Unlimited Service

Switchboard or Order Board with Battery Power Ringing Circuit, Position Dial, Switchboard Telephone, Each Position

	Rate per month
Cordless Type	$3.00
Non-Multiple Cord Type:	
10 lines or less in use	5.00
11-30 lines in use	6.00
31-60 lines in use	7.00
61-100 lines in use	8.00
101-150 lines in use	9.00
151-200 lines in use	10.00
201-260 lines in use	11.00
261-320 lines in use	13.00
Multiple Cord Type:	
Each position with not to exceed one multiple jack per line	15.00
Each additional strip of ten multiple jacks or portion thereof	.30

Stations on Premises in Which Switchboard or Order Board is Located and Connected with That Board

	Spokane
Each station not in guest room, without dial—	
Wall Set	$1.00
Desk Set	1.25
Eact station not in guest room, with dial—	
Wall Set	1.20
Desk Set	1.45
Each station in guest room, without dial—	
Wall Set	.60
Desk Set	.85
Each station in guest room, with dial—	
Wall Set	.80
Desk Set	1.05

Stations outside premises in which switchboard or order board is located—See Mileage Rates, Section 3.

Trunk lines to central office from switchboard or order boards—

Each bothway trunk line.—Individual Line business rate plus $3.00
Each incoming trunk line..... Individual Line business rate.

[fol. 71] Tie lines from switchboard or order board or between separate switchboards—See Mileage Rates, Section 3.

Applications are not accepted for less than two (2) trunk lines and four (4) stations, excluding switchboard telephones. If the switchboard is to be installed outside the primary rate area—See Mileage Rates, Section 3.

[File endorsement omitted.]

UNITED STATES OF AMERICA:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON IN EQUITY

No. 167-E

SUBPŒNA AND RETURN—Filed April 26, 1923

The President of the United States of America to E. V. Kuykendall, as Director of Public Works of Washington; Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, Defendants, Greeting:

You are hereby commanded, that you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Tacoma, Washington, on the 14th day of May, 1923, to answer a Bill of Complaint filed against you in said Court by The Home Telephone and Telegraph Company of Spokane, a Corporation, Plaintiff, and to do and receive what the Court shall have considered in that behalf. And this you are not to omit under the penalty of the law.

Witness the Honorable Edward E. Cushman, Judge of said Court, and the seal thereof, at Tacoma, Washington, this 24th day of April, 1923.

F. M. Harshberger, Clerk, by Alice Huggins, Deputy Clerk.
(Seal U. S. Court.)

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before twenty days from the date of service, excluding the day thereof, at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

F. M. Harshberger, Clerk, by Alice Huggins, Deputy Clerk.
(Seal U. S. Court.)

[fol. 72] United States of America,
Western District of Washington, ss:

Marshal's Return

I hereby certify, that I have served the within writ by delivering to and leaving a true copy thereof with Hance H. Cleland, Supervisor of public utilities of Washington, Frank R. Spinning, as Supervisor of Transportation of Washington, and John H. Dunbarr, Attorney General of Washington, at Olympia, Washington.

E. B. Benn, United States Marshal, by John T. Secrist, Deputy. April 25, 1923. Fees: $10.67.

[File endorsement omitted.]

United States of America,
Western District of Washington, ss:

Return on Service of Writ

I hereby certify and return that I served the annexed Subpœna in Equity on the therein-named E. V. Kuykendall, as Director of Public Works of Washington by handing to and leaving a true and correct copy thereof with Frank R. Spinning, Supervisor of Transportation of Washington, at his usual place of business personally at Olympia, Washington, in said District on the 25th day of April, A. D. 1923.

E. B. Benn, U. S. Marshal, by John T. Secrist, Deputy.

In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Restraining Order—Filed Apr. 24, 1923

This matter coming on for hearing before the Honorable Edward E. Cushman, Judge of the above named court on the motion of the above named plaintiff for a temporary restraining order, restraining

the defendants, and each of them, and all other persons from attempting to compel the plaintiff, its officers, agents and employees, to observe, maintain or keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents and employees, from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and [fol. 73] filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents, or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents or employees, for disregarding the rates and charges set forth in said schedule "Exhibit A," or from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F" and that an order to show cause herein, upon the application of the plaintiff herein, directed to the above named defendants, and each of them, requiring them, and each of them, to show cause why a temporary injunction should not issue as prayed for in the bill of complaint heretofore filed herein, and it being necessary that notice of said application for said temporary injunction be given before said application shall be heard and determined to not only all of the defendants named herein, but to the Governor of the State of Washington as well;

It is, therefore, ordered that the defendants, and each of them, be and appear before the above named court in the District Court of the United States in and for the Western District of Washington, Southern Division, sitting at Tacoma in said District, on the 30th day of April, 1923, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as a court constituted as provided by Section 266 of the Judicial Code of the United States can be convened, then and there to show cause, if any they have, why they, and each of them, should not be enjoined and restrained in the manner hereinbefore stated.

It further appearing to the court that immediate and irreparable loss and damage will result to the plaintiff unless a temporary restraining order is granted, it is ordered that until a hearing of this show cause order and determination thereof, the defendants, and each of them, and all other persons, are restrained from attempting to compel the plaintiff, its officers, agents and employees, to observe, maintain and keep in force the rates and charges now prescribed by the Department of Public Works of Washington, as set forth in schedule "Exhibit A" referred to in the bill of complaint and filed therewith, and from attempting to interfere with or prevent the plaintiff, its directors, officers, agents, or employees from immediately putting into effect the rates and charges set forth in schedule "Exhibit F" referred to in the bill of complaint and filed therewith, and from taking any steps or proceedings against the plaintiff, its directors, officers, agents or employees to enforce any penalty or remedy against the plaintiff, its directors, officers, agents,

or employees for disregarding the rates and charges set forth in said schedule "Exhibit A" and from putting into effect any rates or charges not in excess of those set forth in said schedule "Exhibit F."

And it is further ordered by the court that a copy of this order be served at least five (5) days before said 30th day of April, 1923, upon each and every of the defendants above named, including the Attorney General, and also upon the Governor of the State of Washington.

And it is further ordered that this order shall become effective upon the plaintiff company giving a bond in the sum of $50,000.00 [fol. 74] to be approved by the court, conditioned to reimburse subscribers the excess over the rates set forth in "Exhibit A" in case it is finally determined that the increase in rates hereby authorized ought not to have been authorized; and it is further ordered that until the further order of this court, the plaintiff company shall keep its accounts in such a way that said excess due to the rates made effective by this order and paid by each subscriber, can be readily and accurately ascertained.

And it is further ordered that the plaintiff shall file with the Clerk of the above named court, conveniently after the first day of each month, a statement of the amount collected from each of its subscribers, together with a statement of the amount that would have been collected had the rates set forth in "Exhibit A" been in force, and that when a final decree is entered, if it shall be determined that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, then and in that event the difference between the rates set forth in "Exhibit A" and the rates collected, shall be paid to a special master, to be appointed by this court, and by the special master distributed to the various persons entitled to receive the same; and that in the event that a final decree is entered, adjudicating that the rates set forth in "Exhibit A" should have been continued in effect by the plaintiff, and the plaintiff should fail to pay to the special master the difference between the rates set forth in "Exhibit A" and the rates collected, then the special master appointed by this court, may institute suit on the bond in behalf of all the subscribers, to recover the amounts to which they, respectively, may be entitled.

Done in open court this 24th day of April, 1923.

(Sgd.) Edward E. Cushman, Judge.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. T. BLANCK AS TO COST OF CONSTRUCTION OF PROPERTY—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. T. Blanck, being first duly sworn, deposes and says: That he resides in the City of Berkeley, State of California; that he is thirty-six (36) years of age, and, in the year 1902 was first employed in telephone engineering, construction and maintenance work by The Pacific Telephone and Telegraph Company, its predecessors and associated companies, (one of which is plaintiff company) and was continuously employed by the Pacific Company until the end of [fol. 75] the year 1917, when he entered the United States Army as a commissioned officer in the Signal Corps and upon his return from France upon completion of his military service, late in the year 1919, re-entered the employ of The Pacific Telephone and Telegraph Company, and associated companies, (one of which is plaintiff company) and he has since been employed continuously by said company in general engineering and appraisal work.

That he is thoroughly familiar with telephone properties and with the work, labor and materials entering into the construction of same and with the units of cost thereof, and in the regular course of his employment he has engaged in making appraisals of telephone properties situated in the States of Washington, Idaho, Oregon, California and Nevada and in France, the aggregate value of which runs into more than one hundred millions of dollars, and during the last sixteen or seventeen years, he has given particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

That he is thoroughly familiar with the entire property belonging to plaintiff company in the City of Spokane and in the territory adjacent thereto, all in the State of Washington, and devoted by it to the furnishing of telephone service in said city and territory in said State.

That for several months he has been employed with a relatively large force under his direction in making an exhaustive inventory and appraisal of said property and, in the course of such employment has determined the cost of constructing said property.

That in arriving at the cost of constructing said property he has taken into consideration, among other things, the following facts and matters:

(a) The exhaustive inventory of said property as of June 30, 1922. This inventory was subdivided by accounts in accordance with the system of accounting used by this Company, which is that

prescribed by the Interstate Commerce Commission in its circular entitled "Uniform System of Accounts for Telephone Companies," and which is adopted by the Department of Public Works of the State of Washington.

The work of compiling the inventory was divided into two distinct parts:

1. Collecting the field data.

2. Tabulating and verifying the field data collected.

The field inventory notes were taken during the month of August, at which time of the year the work of the Maintenance force of the Company is at a minimum. In view of this condition, it was deemed advisable to use the services of Maintenance employees and thereby obtain a force which was thoroughly conversant with all the property of the Company. Men who were thoroughly familiar with the items of property to be inventoried were picked from the local organization to do the field work. For example, men whose daily duties were the maintenance of pole line and aerial wire were [fol. 76] assigned the task of securing what was known as the "Pole Line and Wire" data, and the men selected for securing the data on aerial cable were those who had formerly acted in the capacity of foreman in charge of aerial cable construction. Similarly, all other classes of plant information were secured by men who were engaged in the maintaining of plant which they inventoried. The field notes were tabulated by experienced and qualified office men who were thoroughly familiar with reading and tabulating field notes. Exhaustive checks were made during the course of the work to assure the accuracy of the inventory.

The engineers of the Department of Public Works made an exhaustive field and office check of this inventory and it was found by them to be substantially correct in all its details. This inventory was presented in formal hearing before the Public Service Commission of the State of Washington on December 19, 1922, in Case, Cause No. 5344, before said Department, and identified in the records of that case as "Company Exhibit No. 1, Blanck 1."

(b) The exhaustive appraisal of said property as of June 30, 1922. This appraisal was made on the basis of actual performance applied to the items of property as inventoried, with the exception of the item "Land," which was included therein at the then market value, determined by a disinterested appraiser familiar with real estate valuation in the various localities in which the parcels of lands were located. This actual performance basis was determined from the costs as shown by the official records of the Company, which were and are kept in accordance with the system of accounting for telephone companies, prescribed by the Interstate Commerce Commission in its Circular entitled "Uniform System of Accounts for Telephone Companies" and which system was adopted by the Public Service Commission, now the Department of Public Works of the State of Washington.

In determining the actual performance costs, all available records of the cost of building this property were gone over in detail and carefully analyzed.

This appraisal was exhaustively checked by engineers of the Department of Public Works and was found by them to be substantially correct in all its details. This appraisal was presented in formal hearing before the Department of Public Works of the State of Washington on December 19, 1922, in Case, Cause No. 5344, before said Department, and identified in the records of that case as "Company Exhibit No. 3, Blanck 3."

(c) The additions and betterments to said property during the period June 30, 1922, to December 31, 1922. The additions and betterments, or "Net Additions," are taken from the official records of the Company and represent the literal facts taken from the reports of actual daily operations in accordance with the principles established in the accounting methods prescribed by the Interstate Commerce Commission and the Public Service Commission, now the Department of Public Works of the State of Washington.

[fol. 77] (d) The amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets as of December 31, 1922, being the sum of $3,762,955.00.

That adding the additions and betterments to the actual performance appraisal as of June 30, 1922, the cost of the property of plaintiff used and useful in rendering telephone service in the City of Spokane and territory adjacent thereto, all in the State of Washington, as of December 31, 1922, was the sum of $4,266,899, including therein the sum of $68,947 for the Working Capital and Materials and Supplies.

That the cost of property of plaintiff so found herein is substantially the same as the value for rate making purposes fixed by the Department of Public Works in their Findings of Fact, Order and Opinion in Case Cause No. 5344, as of June 30, 1922, plus actual additions and betterments to December 31, 1922.

That the cost of the property of plaintiff so found herein is more than the amount on the books of plaintiff for Fixed Capital (excluding Intangible Capital) and Working Assets, primarily for the reason that plaintiff's capital accounts are characterized by certain erroneous entries having their origin in a misinterpretation of certain Interstate Commerce Commission accounting rules which have persisted pending approval of their correction by the Interstate Commerce Commission.

C. T. Blanck.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of California. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. S. CASASSA—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

C. S. Casassa, being duly sworn, deposes and says: That he resides in San Francisco, California. That he was first employed in the telephone business in 1897 by the predecessor of The Pacific Telephone and Telegraph Company in the Accounting Department, and has ever since been and is now in the employ of said company in its Accounting Department. That since April, 1912, he has held the position of Auditor of Disbursements, and since July, 1922, in the absence, on account of illness, of the General Auditor, has been Acting [fol. 78] General Auditor of said company, and as such has had complete charge of all its accounts and accounting systems, and is thoroughly familiar with the same. That The Home Telephone and Telegraph Company of Spokane is one of the companies in the Pacific System, and the affairs of that company are within the knowledge and control and affiant to the same extent as those of the Pacific Company.

That the accounts of the plaintiff are and have been since January 1, 1913, kept in accordance with accounting regulations prescribed by the Interstate Commerce Commission and adopted by the Public Service Commission of Washington, now the Department of Public Works of Washington.

That the statements as to costs hereinafter set out contain nothing on account of franchises or on account of the item known as going concern value.

1919

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1919 amounted to 2.95 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service including necessary working assets. That a statement showing said costs and the results of said operations for 1919 is as follows:

Average Cost of Property

Average Plant and Equipment	$3,725,767
Average Working Assets	97,695
Total	$3,823,462

Telephone Revenues

Exchange Service	$841,377
Toll Service	65,021
Miscellaneous	25,634
Total Telephone Revenues	$932,032

Telephone Expenses

Current Maintenance	$103,539
Depreciation and Amortization	169,978
Traffic	359,536
Commercial	79,027
General and Miscellaneous	19,267
Uncollectible Operating Revenues	4,000
Taxes	43,652
Rent Reductions	1,422
Licensee Contract Expense	38,776
Total Telephone Expense	$819,197
Net Telephone Revenue	112,835
Per Cent Net Revenue	2.95%

[fol. 79] 1920

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1920 amounted to 1.79 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1920 is as follows:

Average Cost of Property

Average Plant and Equipment	$3,751,075
Average Working Assets	79,597
Total	$3,830,672

Telephone Revenues

Exchange Service	$981,520
Toll Service	81,047
Miscellaneous	35,507
Total Telephone Revenues	$1,098,074

Telephone Expenses

Current Maintenance	$175,627
Depreciation and Amortization	172,835
Traffic	439,788
Commercial	91,342
General and Miscellaneous	24,598
Uncollectible Operating Revenues	1,800
Taxes	75,235
Rent Deductions	1,438
Licensee Contract Expense	46,845
Total Telephone Expenses	1,029,503
Net Telephone Revenue	68,571
Per cent Net Revenue	1.79%

1921

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1921 amounted to 2.35 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operation for 1921 is as follows:

[fol. 80] Average Cost of Property

Average Plant and Equipment	$3,810,406
Average Working Assets	80,179
Total	$3,890,585

Telephone Revenues

Exchange Service	$1,054,760
Toll Service	82,814
Miscellaneous	43,350
Total Telephone Revenues	$1,180,924

Telephone Expenses

Current Maintenance	$211,596
Depreciation and Amortization	179,110
Traffic	436,500
Commercial	103,221
General and Miscellaneous	28,813
Uncollectible Operating Revenues	1,100
Taxes	75,929
Rent Deductions	2,540
Licensee Contract Expense	50,652
Total Telephone Expenses	$1,089,461

Net Telephone Revenue	91,463
Per Cent Net Revenue	2.35%

1922

That the net return earned by the plaintiff through its telephone rates and the rendition of its telephone service during the year 1922 amounted to 3.07 per cent of the cost of its property used or useful in and devoted exclusively to the rendition of said service, including necessary working assets. That a statement showing said costs and the results of said operations for 1922 is a follows:

Average Cost of Property

Average Plant and Equipment	$4,044,954
Average Working Assets	68,947
Total	$4,113,901

Telephone Revenues

Exchange Service	$1,091,268
Toll Service	85,514
Miscellaneous	49,441
Total Telephone Revenues	$1,226,223

[fol. 81] Telephone Expenses

Current Maintenance	$192,258
Depreciation and Amortization	192,040
Traffic	450,672
Commercial	112,954
General and Miscellaneous	37,554
Uncollectible Operating Revenues	4,900
Taxes	54,615
Rent Deductions	2,406
Licensee Contract Expense	52,367
Total Telephone Expenses	$1,099,766
Net Telephone Revenue	126,457
Per Cent Net Revenue	3.07%

That the amounts by which the net telephone revenues derived by the company from its telephone business fall short of a return of 8 per cent upon said cost of the property used or useful in and devoted to the rendition of said telephone business are as stated below for the respective periods indicated:

Year 1919	$193,042
Year 1920	237,883
Year 1921	219,784
Year 1922	202,655

C. S. Casassa.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed April 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I reside in Berkeley, California, and am forty-three years of age; I have been employed in the telephone business for twenty-three years [fol. 82] by The Pacific Telephone and Telegraph Company, its predecessors and associated companies (one of which is the plaintiff company) for twenty-one years; I am Assistance Vice President of the Pacific Company and during my experience with said company have had responsible charge of general engineering matters running to the design and construction of toll and exchange lines, fundamental engineering plans, inventory and appraisal work and similar general engineering matters; I am familiar with telephone properties and with the work labor and material entering into the construction of the same and with the units of cost thereof and in the regular course of my employment I have engaged at different times in making appraisals of telephone property situated in the states of Idaho, Washington, Oregon, California and Nevada, the aggregate values of such run over one hundred millions of dollars, and during the last nine years I have been giving particular attention to the analysis of all costs incurred by telephone companies in all work of construction performed by them.

I am thoroughly familiar with the entire property belonging to the plaintiff company and devoted by it to the furnishing of telephone service in said state and for some years past have had responsible charge of inventory and appraisal work in connection with that property; that for several months I have been employed with a force

under my direction in making an appraisal of said property and in the course of such employment I have made a valuation as of the present time, of all of the property used or useful by the plaintiff company in the rendition of its telephone service.

In arriving at the present fair value of the property of plaintiff hereinafter stated I have taken into consideration among other things, the following facts and matters:

(a) The cost of construction of said property as evidenced by the affidavit of C. T. Blanck, filed herein, is the sum of $4,266,899, as of December 31, 1922, and the fact that said cost includes the cost of a large amount of property, approximately fifty per cent of the total, which was constructed prior to the year 1915, before the increases in labor and material costs due to conditions prevailing during and since the World War became operative.

(b) The amount on the books for said property being the sum of $3,726,955, as of December 31, 1922.

(c) The cost of reproduction new of said property. By using the actual units of property making up the said plant used or useful and devoted exclusively to the rendition of telephone service by the plaintiff and applying thereto prices of labor and material proper as of this time, I have determined the cost of reproduction of said property to be, as of December 31, 1922, the sum of $8,039,784. This value includes a reasonable allowance for working capital, materials and supplies and for the item usually called going concern value. In ascertaining the cost of reproduction new, above stated, I have used prices which I regard as applicable and which are considerably lower than the price prevailing during and since the World War. Had [fol. 83] I used the peak prices prevailing during and since the World War the cost of reproduction new of said property would have been a sum in excess of $19,400,000.

(d) Said telephone property of the plaintiff is and has been, at all times of my employment with the plaintiff company, in a 100 per cent service condition and I have, from time to time, observed and caused to be observed, inspected and examined said property and parts thereof and, in a general way, am familiar personally with the present condition of said property. I have taken into consideration, in arriving at the present fair value of said property, such depreciation in the property as actually exists and have determined that the cost of reproduction of said property less depreciation as of the 31st day of December, 1922, is the sum of $7,382,484.

(e) Appraisals made of the land owned by the plaintiff, as determined from time to time by disinterested appraisers familiar with real estate values in the various localities in which said parcels of land are located.

(f) Based upon my experience in examining and appraising the properties and operations of the plaintiff company and my knowledge of plaintiff's actual requirements over several years for working capi-

tal and materials and supplies necessary in the rendition of telephone service, I have estimated the amount reasonably required by plaintiff for such purpose at not less than $68,947.

After giving careful consideration to all of plaintiff's property, its history, location, and character, and to the factor usually called going concern value, and all facts and matters above enumerated and all other facts within my knowledge affecting its value, it is my opinion that the present fair vaule of the entire Property of the plaintiff used or useful and devoted by it to furnishing telephone service as of December 31, 1922, is in excess of the sum of $5,710,684.

I further say that in arriving at such present fair value I have made no allowance for the value of any of plaintiff's franchises or rights to own or operate a telephone system in the State of Washington or any of its municipalities.

C. E. Fleage

Subscribed and sworn to before me this 19th day of April 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 84] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF J. C. NOWELL—Filed April 24, 1923.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. C. Nowell, being first duly sworn, deposes and says that he is the Vice President of plaintiff, The Home Telephone and Telegraph Company of Spokane, and resides at Hillsborough, California.

That plaintiff had on December 31, 1922, six central offices in the Spokane Exchange and upwards of 31,700 subscribers thereon. That the number of stations, as they are commonly referred to, operated by plaintiff is growing continually, and the estimated growth in the number of stations during the year 1923 in Spokane Exchange, will be approximately 2,100 stations. That plaintiff has more than 22,000 subscribers' accounts for its Spokane Exchange.

That the plant and property of plaintiff are at all times kept in first class condition by making necessary repairs and renewals so that from an operating and service standpoint, all of the plant and property in its entire system are kept in a high state of operating efficiency.

That the business of plaintiff requires large amounts of ma

capital continually because of the continual growth of business and because of its character; that as new subscribers or users of the service are added to the system, it is necessary to install new telephones, equipment and wires running from the place where the telephone station is located to the central office from which the telephones are served. That as the capacity of the switchboards of plaintiff *are filled* up, the installation of additional switchboards, apparatus and equipment, the rearrangement of central offices, the acquisition of additional real estate and the construction of new buildings are required, the total cost of which runs into great sums of money. That the actual net expenditures made by plaintiff for additional property and construction during the years 1921 and 1922 in the Spokane Exchange, were as follows:

Year 1921	Year 1922
$163,099.00	$305,996.00

That the following amounts are planned to be expended by plaintiff for additional property and construction for the Spokane Exchange during the years 1923 and 1924:

Year 1923	Year 1924
$300,000.00	$600,000.00

[fol. 85] That one of affiant's chief duties has been to supervise and examine into the operating expenses of plaintiff, and he has made every effort to effect as many economies as possible to keep the operating expenses at as low a level as is consistent with the maintenance of the plant and the furnishing of good service. That in the opinion of Affiant the operating expenses of plaintiff at the present time are, and during the past have been, fair and reasonable.

That the majority order of the Department of Public Works made on March 31, 1923, deals with all of the property in the State of Washington owned by both The Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane, plaintiff, as one. That said Department estimates the return which will be realized upon said combined properties under the present rates at 6.01%. That said return would not, however, be realized, because of mathematical errors made by the Department in its calculations, which would reduce the net return, and by its failure, after acknowledging the correctness of deducting income taxes as an expense, to make that deduction in arriving at its net return. Taking the property of plaintiff, however, and using the value for rate making purposes found by said department, and figuring the expenses on the erroneous basis used by said Department in arriving at its return of 6.01% for the state as a whole, would give a return on the property of plaintiff of only 4.80% instead of 6.01%.

That Affiant is familiar with the contract between The Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company, referred to in the order of the Department of March 31, 1923, as the 4½% contract which contract under the

contract existing between The Pacific Telephone and Telegraph Company and plaintiff, is made applicable in all respects to plaintiff to the same extent as to said Pacific company. That Affiant is familiar with the services rendered by said American company to plaintiff under said contract. That the telephone service rendered by plaintiff at this time could not be rendered without the facilities and services so furnished by the American company. That such services and equipment are not available to plaintiff from any other source; that in consequence, the payment by plaintiff of the sum of $52,367.00 for the year 1922 made in payment of such services, and the corresponding amount due and payable from the revenue of 1923, were and are inescapable; that said services and the equipment furnished in conjunction therewith are and will be worth to plaintiff in excess of the amount paid and payable under said contract, that said services can not be secured for the payment of $29,500.00 the amount arbitrarily set up by the Department for the year 1923, and that the return of 4.80% disclosed by the Department's findings would for this reason alone be reduced by the difference between said amount and the amount payable under said contract, and that this difference for the year 1923 is more than the sum of $25,500.00. That in addition the expense for depreciation to be met by plaintiff from its revenues from its system in the Spokane [fol. 86] Exchange will be upwards of $61,000.00 in excess of the amount figured by the Department. That with the 4½% payment and the expense for depreciation herein set forth, the rates fixed in the majority order of the Department will give a rate of return to plaintiff from its operations in the Spokane Exchange of not more than 2.72% on the value for rate making purposes fixed by the Department, and of not more than 1.96% on the fair value of plaintiff's property in the Spokane Exchange.

J. C. Nowell.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 24, 1923.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That the property used by the plaintiff in the rendition of its service is classified under the system of accounts prescribed by the Interstate Commerce Commission, the so-called depreciable property being shown under the following items, with the account numbers as indicated:

212. Buildings.
221. Central Office Telephone Equipment.
222. Other Equipment of Central Offices.
231. Station Apparatus.
232. Station Installations.
233. Interior Block Wires.
234. Private Branch Exchanges.
235. Booths and Special Fittings.
241. Exchange Pole Lines.
242. Exchange Aerial Cable.
243. Exchange Aerial Wire.
244. Exchange Underground Conduits.
245. Exchange Underground Cable.
246. Exchange Sumbarine Cable.
251. Toll Pole Lines.
[fol. 87] 252. Toll Aerial Cable.
253. Toll Aerial Wire.
254. Toll Underground Conduit.
255. Toll Underground Cable.
256. Toll Submarine Cable.
261. Office Furniture and Fixtures.
262. General Shop Equipment.
263. General Store Equipment.
264. General Stable and Garage Equipment.
265. General Tools and Implements.

That, in the rendition of its service, the plaintiff uses up the property of the classes indicated in the foregoing classification.

For instance, a switchboard, which under the above classification, would come under the head of central office equipment, Account No. 221, will have a certain useful life in the rendition of the company's service, at the expiration of which it will be discarded.

Among the causes which end the useful life of any piece of depreciable property are natural wear and tear, obsolescence, the fact that it becomes inadequate for the service required of it, public requirements, that is, requirements of public authorities that render necessary changes in plant, storms, fires and other casualties.

When property is discarded, usually more or less salvage is realized from it. Under the said accounting rules and practices the term "net salvage" means the net amount realized from the discarded property; that is, the amount realized from it, less the cost of removing and disposing of it. The amount of this net salvage will obviously vary redically with the different classes of property. For instance, if it were necessary to take down an old pole line, probably the cost of taking the pole line down would amount to more than the poles could be sold for so that here the net salvage would be a minus

amount. On the other hand, in the case of the switchboard, the net salvage would be a substantial amount, although the fact that the relatively large item of labor incidental to its original installation would be entirely lost, would tend to minimize such net salvage.

The cost of depreciable property used up in the rendition of the plaintiff's exchange service, less the net salvage recovered on account of this property when it is discarded, is a part of what it has cost the plaintiff to render this service during the term of the useful life of the property in question.

Under the said accounting rules and practices and under the accounting rules of the Department of Public Works of Washington, the plaintiff is required to charge this cost of expense to its operating expenses, except certain minor items charged initially to certain clearing accounts, in equal periodical increments during the useful life of the property, and this is done month by month. At the time that this charge is made to operating expenses a corresponding credit is made to the account entitled "Reserve for Accrued Depreciation."

When a piece of property is discarded, this account "Reserve [fol. 88] for Accrued Depreciation" is charged with the difference between the cost of this property and the net salvage recovered from it. At the same time the proper fixed capital account is reduced by the amount of the original cost of the property in question.

The cost of rendering plaintiff's service is treated in the accounts in the same manner in which other cost items extending over a considerable period are treated. In the cases of taxes covering a year or interest covering a fixed period, or expenses of financing and bond discounts covering a number of years, the total expense is ascertained and is then charged to the operating expenses and credited to the account entitled "166—Taxes Accrued," or "167—Accrued Liabilities Not Due," as the case may be, against which account the payment when made is charged in a lump. In none of these cases is any specific reserve actually set aside.

While the depreciation account is entitled "Reserve for Accrued Depreciation," no reserve in the sense of a fund set aside for this specific purpose is maintained. The moneys taken out of earnings and represented by these charges to operating expenses and credits to this account go into the general funds of the plaintiff and find their way into property and plant owned by it so that as parts of its investment are retired, they are replaced by other investments in a like amount and its capital is maintained unimpaired.

The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account "Reserve for Accrued Depreciation" are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance. The original cost is readily and definitely ascertainable. What will be the useful life of any piece of telephone property and what will be the net salvage recovered upon the termination of this life, are factors looking to the future which

must necessarily be based upon estimates founded upon the judgment of those educated in the business applied to the recorded experi-nce of the company over a long series of years.

While the exact time when any specific piece of property will go out of use may not be accurately determinable, the average useful lives of the various classes of property are factors which may be fixed with substantial accuracy and this is true also as to the determination of the net salvage. These determinations should be reviewed from time to time and where there are changes in conditions or in the character of the plant which appear to be more than temporary so as to affect substantially these averages, corresponding adjustments should be made.

During the last six years, it has been part of my duty to study continuously the facts bearing upon these factors of useful life and net salvage, for use as a basis for revision of charges to operating expenses and credits to accounts "Reserve for Accrued Depreciation" when changed conditions made the same proper. The last such revision made effective the 1st day of August, 1919, produced a re-
[fol. 89] duction in the composite rate previously in effect and applied to present depreciable property from 6.19% to 5.78%.

That in the contract made between the Postmaster General and the plaintiff in connection with the federal possession, control and operation of the plaintiff's property during the year August, 1918, operating expenses and clearing accounts and credits to the account "Reserve for Accrued Depreciation" was fixed at 5.72%, except to August, 1919, the comparable composite rate for the charges to that the item of Right of Way, Account No. 207, was not included in this composite rate but was carried separately with a depreciation rate of 2.55 per cent. This item is small and would not materially affect the said figure of 5.72 per cent. This composite figure was applied to plaintiff's total depreciable property during the year of federal operation.

That upon the termination of federal operation on August 1, 1919, plaintiff put into effect the rates of depreciation shown below and these rates have been continued in effect up to this time:

Depreciation Rates in Effect Since August 1, 1919

212. Buildings	3.0
Cable, Aerial:	
242. Exchange	5.4
252. Toll	5.0
Cable, Underground:	
245. Exchange	3.0
255. Toll	2.8

Cable, Submarine:

246.	Exchange	8.0
256.	Toll	8.0
221.	Central Office Equipment	8.0
222.	Other Equipment of C. O.	8.0

Conduit, Underground:

244.	Exchange	2.7
254.	Toll	2.0
261.	Office Furniture and Fixtures	10.0

Pole Lines:

241.	Exchange	10.0
251.	Toll	6.1
207.	Right of Way—	
	Exchange	2.55
	Toll	2.55

[fol. 90] Station Equipment:

231.	Station Apparatus	8.0
232.	Station Installations	...
233.	Interior Block Wires	...
234.	Private Branch Exchanges	8.0
235.	Booths & Spl. Fittings	8.0
262.	General Shop Equipment	10.0
264.	General Stable and Garage Equipment	20.0
263.	General Store Equipment	10.0
265.	General Tools & Implements	20.0

Wire, Aerial:

243.	Exchange	10.0
253.	Toll	3.8

That the composite rate resulting from the application of the above specific rates to the depreciable property was 5.63% for the year 1920, 5.73% for the year 1921 and 5.81% for the year 1922.

That under the regulations of the Interstate Commerce plaintiff is required to file an annual report as of December 31st, showing, among other things, the composite rate of depreciation charged during the year. Plaintiff has so filed the composite rate so charged for each year.

That the amendment to Paragraph 5 of Section 20 of the Interstate Commerce Act, made by Section 435 of the Transportation Act, 1920, became effective on February 28, 1920, and that in the exercise of the authority vested in the Interstate Commerce Commission by said amendment to the Interstate Commerce Commission Act, on March 18, 1920, it issued the following order:

"Interstate Commerce Commission, Washington

"March 18, 1920.

"To all carriers concerned:

"Section 435 of the Transportation Act, 1920, contains the following provision:

"'The Commission shall, as soon as practicable, prescribe, for carriers subject to this Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property, classifying the carriers as it may deem proper for this purpose. The Commission may, when it deems necessary, modify the classes and percentages so prescribed. The carriers subject to this Act shall not charge to operating expenses any depreciation charges on classes if property other than those prescribed by the Commission, or charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission. No such carrier shall in any [fol. 91] case include in any form under its operating or other expenses any depreciation or other charge or expenditure included elsewhere as a depreciation charge or otherwise under its operating or other expenses.'

"Information received by the Commission indicates the existence of doubt as to the propriety of carriers making any charges to operating expenses with respect to depreciation prior to such time as the Commission shall prescribe the specific percentages of depreciation which shall be charged.

"The purpose of this circular is to dispel any such doubt as may exist in the minds of accounting officers.

"Until the Commission shall otherwise order, all carriers subject to the Act to regulate commerce should continue to observe the requir-ments respecting the accounting for depreciation which are embodied in the effective accounting classifications prescribed by the Commission for the respective classes of carriers.

"George M. McGinty, Secretary."

That in order to carry out the provisions of said Section 20, as amended, the Interstate Commerce Commission organized a subdivision of its bureau of accounts, which is designated as the depreciation section, with Mr. Frank S. Fowler as chief for the purpose of aiding the commission in carrying out the provisions of said section as amended.

That for over a year last past, the said depreciation section has been conducting an investigation of the subject, preliminary to public hearings, which the Commission has indicated its purpose to hold with reference to this matter. In connection with this investigation Mr. Charles A. Heiss, Comptroller of the American Telephone and Telegraph Company, has been authorized to represent the Bell System companies, including the plaintiff, before the depreciation section.

That on January 6, 1921, the said Mr. Fowler addressed to the said Mr. Heiss a letter, copy of which follows:

"Interstate Commerce Commission, Bureau of Accounts, Washington

"January 6, 1921.

"Mr. Charles A. Heiss, Comptroller American Telephone & Telegraph Co., 195 Broadway, New York, New York.

"DEAR SIR: Section 20 of the Interstate Commerce Act, as amended February 28, 1920, requires the Interstate Commerce Commission to prescribe for carriers subject to the Act, the classes of property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall be charged with respect to each of such classes of property.

"For the purpose of carrying out these requirements a preliminary investigation of the depreciation question is being conducted to secure all information possible to formulate recommendations which [fol. 92] will be made public and fully considered at public hearings before the Commission takes the final steps required by the Act.

"In view of the magnitude of this subject and its paramount importance it is desired that all interested persons be given an opportunity to present their views and you are therefore requested to submit, with as little delay as possible, a statement or brief representing the opinion of your company with respect to the classes of depreciable property (by groups if practicable), the method of ascertaining the service life and salvage value, the basis upon which depreciation charges should be accrued, the necessity for accruals, the relation of maintenance charges to depreciation and the manner in which the percentages of depreciation applicable to the several classes of property should be determined.

"It is also desired that you incorporate in the statement any suggestions or procedures which in your judgment will aid the Commission to reach a just and reasonable determination of the questions involved.

"It will be much appreciated if you will advise me of the approximate date *of* your statement may be expected.

"Yours very truly, Frank S. Fowler, Chief of Depreciation Section."

That in response to this letter, Mr. Heiss wrote Mr. Fowler, under date of March 24, 1921, setting forth in behalf of the Bell System the view, opinions and suggestions endorsed by those companies, responsible to the third and fourth paragraphs of the above letter.

That the rates put into effect on August 1, 1919, when the federal government surrendered the possession and control of plaintiff's property, as above set forth, have been maintained in effect pursuant to said order up to the present time.

That under date of December 30, 1921, pursuant to the requirement of the Interstate Commerce Commission, plaintiff filed with

said Commission the said specific rates of depreciation so put into effect on August 1, 1919.

That under date of March 10, 1923, the Interstate Commerce Commission issued an Order No. 14700, setting the date of May 1, 1923, at 10:00 A. M. at Washington, D. C., for the beginning of the presentation of evidence. That said Order had attached thereto a report of the preliminary investigation of depreciation charges of telephone companies and the conclusions and recommendations of the depreciation section for the regulation of such charges.

That in the meantime, the plaintiff has been and is now co-operating with Mr. Heiss in an endeavor to furnish the data necessary to enable the Commission to prescribe, under the Act of Congress aforesaid, the classes of plaintiff's property for which depreciation charges may properly be included under operating expenses and the percentages of depreciation which shall thereafter be charged by the plaintiff with respect to each class of property.

That the "Reserve for Accrued Depreciation" of the plaintiff company as of December 31, 1922, is not more than sufficient for the [fol. 93] telephone property that is owned and is being operated by the said company.

To compare the "Reserve for Accrued Depreciation" with the amount of physical depreciation existing in the plant, as the majority opinion undertakes to do, is to compare factors which are not comparable, for the reason that physical depreciation, commonly referred to as per cent condition, is a factor of present physical condition, and as such is but one of the many factors to be considered from the view point of current expense of depreciation, which is the problem of distributing the total amount thereof concurrently month by month over the life in service of the plant by a proper recognition in current expenses.

As heretofore pointed out the so-called reserve here under discussion is in fact a debit account and not a source of current funds for this or any other purpose; and the resources indicated thereby are in fact among the general assets of the Company and to deny a current expense by recourse to these assets, which is the necessary result of carrying the order of majority of the Department into effect, is to compel the meeting of a current expense by a recourse to plaintiff's general assets and an arbitrary dissipation of plaintiff's assets in lieu of providing current rates sufficient to meet the current expense of depreciation.

That, in my judgment, a rate of depreciation of three and one-half per cent is totally inadequate and insufficient to cover the expense of depreciation that is and will be experienced in the property. That said rate of three and one-half per cent is stated by the majority order to be designed to decrease the amount of the reserve which is erroneous in principle in that it admittedly does not cover for the period in question the pro rata of the amount of depreciation actually to be experienced. That from numerous studies and calculations I have never found from the actual experience of the com-

pany a rate in the aggregate of less than five and one-quarter per cent.

C. E. Fleager.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

[fol. 94] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF P. H. COOLIDGE—Filed Apr. 24, 1923

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

P. H. Coolidge, being first duly sworn, deposes and says: That he is a graduate of the Massachusetts Institute of Technology in the class of 1894. That he has been employed by The Pacific Telephone and Telegraph Company since August 1, 1909, and prior to that time, from 1897, was employed by the Western Electric Company, and that he has had more than twenty-five years' experience in the telephone business.

That since January 16, 1917, he has been General Commercial Superintendent of The Home Telephone and Telegraph Company of Spokane, in which position he has charge and supervision of the making of schedules of rates for The Home Telephone and Telegraph Company of Spokane and the preparation of studies in relation thereto, including studies of the effect of rates on the revenues of that Company. That he is familiar with all the rates and charges which are made by The Home Telephone and Telegraph Company of Spokane for telephone service and facilities furnished by that Company and with the schedules of such rates which are now and have been from time to time filed by that Company with the Department of Public Works and its predecessor, the Public Service Commission of Washington, and with the various changes in rates, so filed, which have fom time to time been made. That the exchange rates which The Home Telephone and Telegraph Company of Spokane now has in effect for telephone service have been continuously in effect since April 1, 1919.

That he is familiar with the order of the Department of Public Works of Washington, dated March 31, 1923, signed by two members of said Department, and also with the order made on the same date, signed by the third member of said Department.

That he has made a careful estimate of the revenue which will be derived by The Home Telephone and Telegraph Company of Spokane for the year 1923, in the event that the rates, both toll and exchange, now and since 1919 in effect shall continue in effect throughout said year, taking into consideration the probable growth in the number of telephones which will be experienced and the growth in toll business. That as a result of this estimate, in his opinion, the revenue of The Home Telephone and Telegraph Company of Spokane, which will be derived under the present rates for the year 1923, will be the sum of $1,284,000.00.

That he has also made an estimate of the effect on the revenue of The Home Telephone and Telegraph Company for the year 1923, [fol. 95] if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect throughout said year, and from this estimate has determined that, if the rates, both toll and exchange, fixed in the minority order of March 31, 1923, were in effect for the year 1923, the revenue of The Home Telephone and Telegraph Company for that year would have been the sum of $1,549,000. That in his opinion, the return to the Home Company even under the minority rates, while greater than under the rates now and since 1919 in effect, would be less than sufficient and less than the rate to which the Home Company is entitled upon its property used and useful in rendering telephone service, and that the service to be had by subscribers under those rates would be worth more to them than the charges therefor.

That he has had a long experience in making estimates of the amount of revenue to be derived under different schedules of rates for varying periods in the future, and it has been his experience that estimates so made by him approximate closely the results actually experienced. That, in his opinion, the estimates made by him for the Home Telephone and Telegraph Company of Spokane for the year 1923, under the two schedules of rates has hereinbefore set forth, are substantially correct and that the results actually experienced thereunder will not vary to any material extent from the said estimates.

P. H. Coolidge.

Subscribed and sworn to before me this 19th day of April, 1923. Frank L. Owen, Notary Public in and for the City and County of San Francisco, State of Calif. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF HENRY L. GRAY—Filed Apr. 24, 1923

STATE OF WASHINGTON,
County of King, ss:

I, Henry L. Gray, being first duly sworn, depose and say:

My age is forty-two years. I was educated at the University of Missouri. I reside at Seattle, Washington, where I maintain an office at 40 Henry Building, from which I engage in the practice of civil and electrical engineering, specializing in the valuation of public utility properties; in rate and service investigations and reports on public utilities for investment houses. My engi- [fol. 96] neering training and experience extend over a period of approximately twenty-four years. My preliminary training was acquired in connection with telephone and railroad construction. For the past sixteen years, I have been continuously engaged in work involving valuations of properties of public service corporations, a general outline of such work being as follows:

In 1906, I was employed by the Railroad Commission of Washington as Assistant Engineer in connection with the valuation of railways then being conducted by that state. In 1908, I became Chief Engineer; and in 1911, and through a change of name of the regulatory body, I became Chief Engineer of the Public Service Commission of Washington, and continued in that capacity until February 1, 1913. My work with the Railroad Commission and Public Service Commission of Washington consisted to a large extent of the valuation of public utility properties of all kinds, including telephone properties; and in public utility rate and service investigations.

On February 1, 1913, I opened my office in Seattle as consulting engineer, specializing in public utility work; and since that date my work has consisted practically altogether of valuations and rate and service investigations for public utilities, municipalities and regulatory bodies and in the preparation of reports on existing and proposed public utility projects for investment houses. My work as engineer in private practice has called for a close study of the subject of the valuation of public utility properties, and has required my appearance in valuation and rate cases before the regulatory bodies of Washington, Oregon, Idaho, California and Illinois, as well as before special commissions in Canada.

In my work, since 1906, I have appraised 63 different public utility properties. In the case of nine of these properties, I acted as principal assistant to the engineer in charge; while in the case of the remaining fifty-four properties, which represented an investment of more than Five Hundred Million Dollars ($500,000,000.00),

I was engineer in charge of all work. Of these fifty-four properties, ten were telephone systems, consisting of the plant of the Independent Telephone Company of Seattle, the plans of the Northwest Telephone Company in Snohomish County, Washington, and the plants owned by The Pacific Telephone and Telegraph Company in Seattle, Spokane, Tacoma, Everett, Bellingham, Centralia, Olympia and Bremerton, all in the State of Washington. In addition, I have been connected in a consulting capacity with a number of other appraisals, generally for the purpose of appraising some particular class of property, or investigating some particular feature of the case. I am familiar with the methods employed by experts, commissions and courts in arriving at the values of public utilities, and with the general trend of labor and material costs.

Since May 1, 1922, I have been continually engaged in an examination of the property and affairs of The Home Telephone and Telegraph Company of Spokane, and in a determination of the value of the property devoted to public use by said company. As [fol. 97] the result of this investigation, I am convinced that the value of such property, on the 31st day of December, 1922, was in excess of Five Million, Eight Hundred Fifty Thousand Dollars ($5,850,000.00). My reasons for this conclusion are as follows:

The value of the property in question will be represented by its reasonable reproduction cost, less accrued depreciation, plus a fair allowance for what is ordinarily known as going value. Due to the sudden and unprecedented increase in construction costs following the beginning of the World War, and to the possibility that such high prices may continue for a considerable period, it is admittedly difficult to arrive at what might be called a reasonable reproduction cost. Diagrams "A" and "B" attached hereto show that during the period from the end of the panic, in 1896, to about the beginning of the year 1915, there was a steady and almost uniform increase in the average costs of labor and materials, as evidenced by the Wholesale Commodity Price Index Numbers, computed and published by the United States Bureau of Labor Statistics. But following the year 1915, there was a heavy increase in labor and material costs, the peak of such costs being reached about the middle of the year 1920. Following this peak, there was a marked decline in prices, which continued until about the beginning of the year 1922; but since the early part of that year, there has been a general increase in wholesale commodity prices and a very substantial increase in the costs of labor and materials entering into construction. On April 1, 1923, the average cost of construction labor and materials was approximately thirty per cent higher than the corresponding costs of April, 1922, and were only twenty-two per cent less than the peak costs of 1920. The present trend of prices is decidedly upward, and this condition has existed for more than a year. It is impossible to predict to what extent this increase will continue, but at the present time there is no indication of any recession in construction or maintenance costs. On the contrary, all of the data available indicates a still further increase in such costs, as labor costs

in general are advancing. It is difficult to abandon the idea that present-day costs eventually will recede, but as to when this will occur, no one can say; and it is generally conceded that a new price level has been established and that construction costs never again will reach pre-war levels. Under the circumstances as recited, the difficulties of arriving at what might be termed "a reasonable reproduction cost" are obvious.

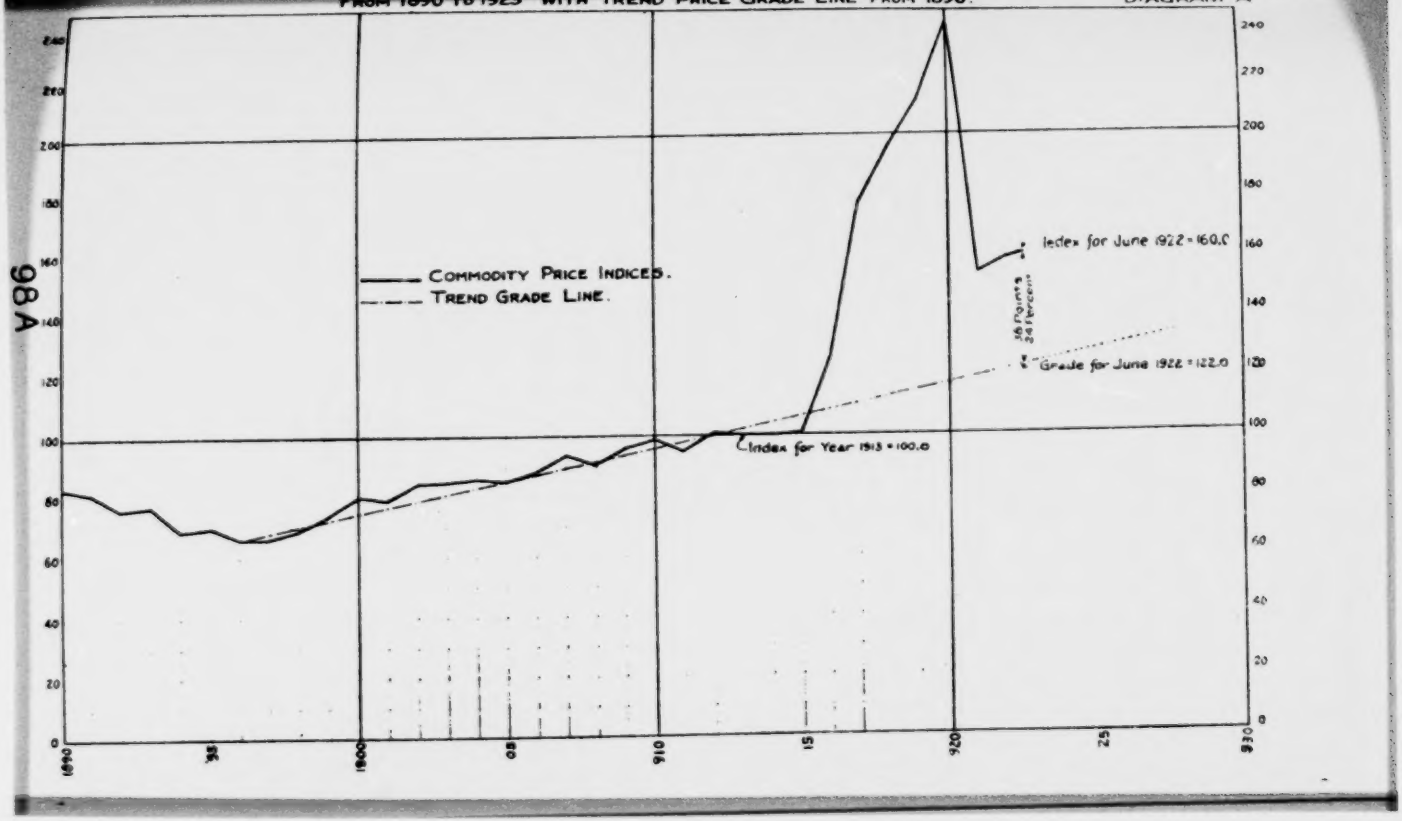
The reproduction cost of the property in question, as of June 30, 1922, less accrued depreciation and plus a reasonable allowance for going value, was found by The Home Telephone and Telegraph Company of Spokane to be $7,171,800.00. I have made a study of this reproduction cost estimate, of the going value calculation and of the accrued depreciation in question, and am convinced that the above amount, or $7,171,800 stated by The Home Telephone and Telegraph Company of Spokane to represent the reproduction cost of its property as of June 30, 1922, less accrued depreciation and plus going value, is reasonable, fair and conservative. This, if [fol. 98] added to the cost of additions to the property of the said company between the dates of June 30, 1922, and December 31, 1922, which I find to have been $210,684.00, would give a resulting reproduction cost less depreciation plus going value as of the latter date, of $7,382,484.00. In the absence of any unusual conditions, this might be considered to be the fair value of property in question.

It is my opinion that in fixing value, the possibility of the ultimate recession in prices must be taken into consideration; and that to base the value of a property solely upon labor and material costs of the present would be unwise; and that in arriving at such value the construction costs of the present should be discounted to some extent—and the determination of the proper discount is the problem.

Diagram "B" attached hereto shows the general similarity of the graphs of Wholesale Commodity Price Indices during the years 1914 to 1923, inclusive, as computed and published by the Bureau of Labor Statistics, and the corresponding Construction Cost Indices computed and published by the Engineering News-Record. Diagram "A" attached shows the graph of Wholesale Commodity Price Indices during the period from 1890 to 1923; and from this diagram it is apparent that had the World War not occurred, that prices might have been expected to follow the general upward trend indicated by the Trend Grade Line from the end of the panic in 1896 to the beginning of the year 1915; and that therefore on June 30, 1922, commodity prices in general would have been approximately thirty-eight points or twenty-four per cent less than the corresponding prices actually prevailing upon that date.

Applying a reduction factor of twenty-four per cent to the reproduction cost less depreciation of the property in question as of June 30, 1922, and adding a reasonable allowance for going value, would result in a total of $5,655,264.00; which, when there is added thereto the cost of additions to the property of the said company during the last six months of the year 1922, or $210,684.00, will give a total value of $5,865,948.00. Therefore, I believe that the fair value of

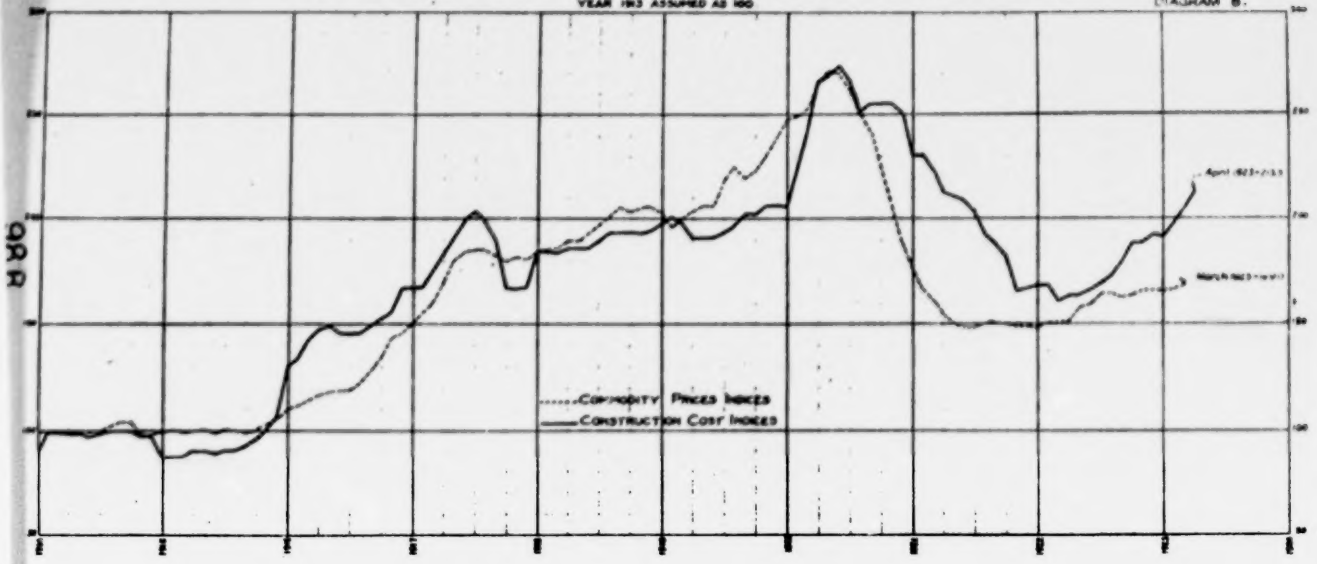
GRAPH SHOWING AVERAGE YEARLY INDICES (OLD METHOD) OF WHOLESALE COMMODITY PRICES, FROM 1890 TO 1923 WITH TREND PRICE GRADE LINE FROM 1896. DIAGRAM A



GRAPHIC COMPARISON OF WHOLESALE COMMODITY PRICES AND CONSTRUCTION COSTS 1914 TO 1923.

YEAR 1913 ASSUMED AS 100

DIAGRAM B.



the property in question, or that owned and used for the public convenience by The Home Telephone and Telegraph Company of Spokane on December 31, 1922, is in excess of Five Million Eight Hundred Fifty Thousand Dollars ($5,850,000.00).

Henry L. Gray.

Subscribed and sworn to before me this 23rd day of April, 1923. J. E. Peterson, Notary Public in and for the State of Washington, Residing at Seattle. (Notarial Seal.)

[File endorsement omitted.]

(Here follow diagrams A and B, marked side folio pages — and —)

[fol. 99] In the District Court of the United States for the Western District of Washington, Southern Division

[Title omitted]

Affidavit of R. Lewis Rutter—Filed Apr. 24, 1923

State of Washington,
County of Spokane, ss:

R. Lewis Rutter, being first duly sworn says: that he is a resident of the City of Spokane in said County and is an investment banker; that he is the President of the Spokane & Eastern Trust Company, a corporation organized under the laws of the State of Washington, which has been doing a banking, trust and investment business for more than thirty years in the City of Spokane and vicinity; that he has been with said investment house for 28 years continuously and for the past seven years has been President thereof; that said corporation is a member of the Investment Bankers Association of the United States.

Spokane & Eastern Trust Company, aforesaid, deals extensively in investment securities of the classes offered to what are known in banking circles as the conservative investor, and it therefore confines its purchases and sales of securities to those which it considers to be conservative investments, and is, and for many years has been, one of the largest houses in Spokane handling public utility securities; that it is the practice of deponent's said house to make an investigation of the operations of any public utility before it deals in the securities of such utility; that when a proposal is made to it to handle such securities it first makes a preliminary investigation of the facts and figures relating to the company generally in order to determine whether or not there is a safe basis for the bonds or other securities which it is asked to handle, and if that matter is determined satisfactorily the investigation is continued by having an engineering examination made by competent engineers and accounting examinations made by expert accountants.

That it is the opinion of the deponent that a public utility such as the plaintiff should earn an annual return of not less than 8 per cent (after providing for depreciation) upon the fair and reasonable value of its property used or useful in the rendition of its service in order to place its securities upon a parity with other investments competing for funds in the market.

That in order to make the securities of a public utility saleable, it is necessary that public confidence in such securities be established and maintained. The investors must have reasonable assurance of the integrity of the investment and the safety of their money, and must be afforded a return at least equal to the returns which they could obtain through other available investments of similar desirability.

That the cost to public utilities of borrowed money, where the [fol.100] loans are adequately secured and where there is a fixed obligation to return the money borrowed at a definite date, is obviously less than the fair return necessary to induce the investment of funds that are to be invested at the risk of the business. That the cost of borrowed money to public utilities during the last three years has run as high as 10 per cent for short term loans and has averaged over 7 per cent for long time money. That at present such corporations cannot obtain money on long time loans, even though adequately secured, at less than an average cost of approximately 6 per cent. That prudence and conservatism dictate that only a proportion of the capital requirements of such corporations should be raised by the sale of bonds or other loans. That it is fundamental that public utilities which expect to continue permanently in business and which are required continuously to increase their investments in order to meet the public service resuirements imposed upon them, must have a market for their stocks, and their stocks are not sal-able to investors unless it can be demonstrated that the company offering such stocks is earning and will continue to earn at least a reasonable return upon the value of its property devoted to the public use. That there is active competition among utility corporations, industries and other businesses for the surplus funds which are at any time available for new investments and a telephone company like the plaintiff is compelled to meet this competition and to offer inducements to investors equal to those offered by others at the same time.

R. Lewis Rutter.

Subscribed and sworn to before me this 20th day of April, 1923. H. V. Davis, Notary Public in and for the State of Washington, Residing at Spokane. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF C. E. FLEAGER—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, C. E. Fleager, being first duly sworn, depose and say: That I am the C. E. Fleager who made the affidavit herein as to value verified the 19th day of April, 1923.

That I have read the affidavit of Alex M. Winston dated April 27, 1923, in the above entitled cause. That the matter of increased maintenance expenses has been thoroughly examined into by the engineers of the Commission and the cause for the increase [fol. 101] thoroughly explained in exhibits filed before the Department of Public Works, in the matter referred to in the bill of complaint herein; that the principal causes of this increase are the increase in the amount of business over the period in question and the increased wage cost, due to war and other conditions.

That despite the impression given in the comparison between maintenance expense and expense of depreciation, there is no overlapping of these two expenses, as in accordance with the accounting instructions the two expenses are entirely separate and distinct.

That it is not a fact that no evidence was introduced to show the value of the various services rendered under the so-called 4½% contract, but that in General Exhibit "X" of the Department, a comprehensive showing was made on this point, showing that the value of the service rendered was considerably in excess of the payment thereunder.

That the statement that the value of all the exchanges in the State of Washington, including the Spokane Exchange, exclusive of toll lines, is $19,000,000 in round numbers, is erroneous because it gives no consideration to the item "construction work in progress," which item was allowed by the Department of Public Works; further, that these figures are the so-called rate base figures of the Department and not the value of that property. Also that the figure of $5,000,000 quoted for the value of the long distance lines is similarly erroneous.

That on page 9 of Mr. Winston's affidavit, he states that the net earnings of the Home Company is 3.78% on the company's fair value. From the calculations immediately following this figure, it appears that said Winston is referring to the rate of return of 3.378% shown in Department's Exhibit No. 4, page 7, which figure gives consideration to the 4½% payment and to depreciation and is not calculated on the company's fair value, but upon the Department's rate base, excluding construction work in progress. This rate base was not approved in the majority opinion, but the rate base including

"construction work in progress" was approved. Further, from this same exhibit, prepared by the Chief Engineer of the Department, it is shown that the earnings of the Home Company have been as follows:

Year	Return
1915	1.25%
1916	3.75%
1917	2.22%
1918	1.03%
1919	3.02%
1920	1.83%
1921	2.41%
1922 (six months)	3.29%

Included in these figures have been the actual expenses of depreciation, as shown by the books of the Home Company which are given in detail in City of Spokane's Exhibit "2," page 19, said exhibit be-
[fol. 102] ing prepared by an expert accountant employed by the City of Spokane.

The relation of the expense of depreciation to the depreciable property is shown as follows:

Year	Per cent
1915	6.66%
1916	5.33%
1917	6.00%
1918	6.18%
1919	5.52%
1920	5.59%
1921	5.51%
1922 (six months)	5.65%

Upon the assumption that the rates of depreciation as shown were changed to conform to the rate stated in the majority order, namely 3½%, the net earnings of the Home Company for the same years would be as follows:

1915	4.01%
1916	5.18%
1917	4.17%
1918	3.11%
1919	4.68%
1920	3.54%
1921	4.22%
1922 (six months)	5.11%

Mr. Winston's affidavit suggests that the depreciation allowance is excessive in the amount of $75,000 per year. This conforms closely to the 3½% allowance of the majority opinion, and over the eight years in question, had the expense of depreciation been

$75,000 per year less, the reserve instead of being approximately $900,000 at the end of the year 1922, would have been $300,000, and the average net earnings over that period shown in detail in the tabulation just above, would have been approximately 4¼% per year. Had the expense for depreciation been so adjusted as to have entirely wiped out the reserve, the average net earnings under that assumption would have been approximately 5¼% per annum.

That the suggestion in the affidavit of Mr. Winston that the fair allocation of toil revenues should be $80,000 per annum greater is contrary to the decision of the Department and further that the existing payment of 30% is as much or greater than has generally been approved by commissions or courts.

That numerous errors occur in the said affidavit of minor importance, but which do not seem material to the present hearing, and therefore are not referred to.

(Sgd.) C. E. Fleager.

[fol. 103] Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF W. J. PHILLIPS—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

I, W. J. Phillips, being first duly sworn, depose and say: That I am Commercial Superintendent of the plaintiff The Home Telephone and Telegraph Company of Spokane, and reside at Seattle, Washington; that I have examined the records of the company and find that during the five (5) months ending March 31, 1923, there were in the Spokane Exchange nineteen hundred three (1903) telephone stations disconnected for all reasons, an average of three hundred eighty-one (381) per month.

That in the Spokane Exchange, as stated in the affidavit of Mr. J. C. Nowell, there are more than twenty-two thousand (22,000) subscribers; that of these 22,000 subscribers, eight thousand one hundred seventy-eight (8,178) are four-party residence subscribers and nine thousand one hundred seventy-six (9,176) are individual and two-party residence subscribers.

That during the year 1922 there was collected for long distance toll messages at the Spokane Exchange a sum in excess of thirty-two

thousand dollars ($32,000) from hotels. This sum is made up of many messages from 10 cents in price upward; that the particular person making the call is frequently unknown to the plaintiff company owing to the semi-public and public nature of these telephones; that there are in addition other telephones of a public and semi-public nature from which substantial sums of money are collected under the same circumstances; that if increased rates are not granted, it will be practically impossible to recover the difference between the present charge and a higher charge should it be deemed proper to recover it at a later date.

(Sgd.) W. J. Phillips.

Subscribed and sworn to before me this 30th day of April, 1923. Maurice R. McMicken, Notary Public in and for the State of Washington, Residing at Seattle. (Seal.)

[File endorsement omitted.]

[fol. 104] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISMISS—Filed Apr. 30, 1923

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court to dismiss the bill of complaint filed herein for the reasons and upon the grounds that as appears upon the face thereof

I. Said bill of complaint does not state any matters of equity entitling the complainant to the relief prayed for.

II. Said bill of complaint does not state facts sufficient to entitle complainant to any relief against these defendants.

Wherefore defendants and each of them pray the judgment of this court whether they shall further answer, and that they be dismissed with their costs.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

Come now the defendants E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and John H. Dunbar, Attorney General of the State of Washington, and each of them, and move the court for an order denying the application for an interlocutory injunction and declaring said restraining order to be void from its inception, and in the alternative, to dissolve said restraining order.

[fol. 105] This motion is based on the files and records in the above entitled case, and upon the affidavit of E. V. Kuykendall, hereto attached.

John H. Dunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF E. V. KUYKENDALL—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of Thurston, ss:

E. V. Kuykendall being first duly sworn, on oath deposes and says:

That he is one of the defendants named in the above entitled proceeding; that he is now and has been for more than three years last past the duly appointed, qualified and acting Director of the Department of Public Works of said state, and as such charged with the duty of administering the provisions of the "Public Service Commission Law" of said state and the acts amendatory thereof and supplementary thereto. That, during the incumbency of affiant as Director for said Department of Public Works, he has conducted, as provided by law, a large number of investigations involving the properties, rates and service of public utilities operating within the said state, and, in particular, of telephone companies, including plaintiff. That, prior to his incumbency, the Public Service Commission of Washington, predecessor of the Department of Public

Works of Washington, had conducted, as by law provided, a large number of investigations of the properties, rates and service of utilities generally and telephone companies operating within the said state. That these investigations have resulted in the accumulation of a large amount of data involving every feature of the construction, operation and maintenance of telephone properties within said state, and this data has at all times been available and has been used by the affiant and the staff working with him in the employ of the state of Washington for examination and comparison in investigations of the sort herein involved, and in particular with respect to the investigation which is the subject of this action.

That affiant has examined and is familiar with the bill of complaint and exhibits, and the affidavits in support of the bill of complaint, filed herein. That there is now and was at the time of the hearing before the Department of Public Works herein substantial agreement between the experts, engineers and accountants in the employ of the state of Washington and acting under the direction [fol. 106] of affiant and the experts, engineers and accountants testifying for the plaintiff herein, with the following exceptions:

(a) Treatment of expense of depreciation;

(b) Treatment of compensation paid to the American Telephone and Telegraph Company.

That the amount of the expense items above designated as (a) and (b) have a controlling effect upon the rate of return shown in any statement prepared to reflect the result of plaintiff's operations.

There are two general methods of determining the amount which should be charged to operating expenses on account of depreciation. One of these methods may be referred to as the "life table method." It is the method which has been used by plaintiff, and has resulted in the accrual of a balance in its "reserve for accrued depreciation" which amounts to approximately twenty-seven per cent of the original cost of its depreciable property. Stated briefly, the application of the life table method is substantially as follows: A given group of plant units is found to have an average life in service of ten years, with no salvage value. It therefore follows, under a computation made on this basis, that the average annual rate of depreciation will be ten per cent. The amount obtained by application of this percentage is set aside annually in the depreciation reserve in order that when the property reaches the end of its useful life there may be in the reserve an amount equal to its original cost. This method inevitably results in building up a credit balance in reserve for the reason that, in a constantly growing plant, the annual retirements will not equal the annual credits to the reserve account.

The affidavit of one C. E. Fleager, on file herein, states in part as follows:

"The factors which determine the amount which should be periodically charged to the operating expenses and credited to the account

'reserve for accrued depreciation' are the original cost of the property, the net salvage, the term of its useful life, and the coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance."

The Uniform System of Accounts, prescribed by the Interstate Commerce Commission for telephone companies and adopted by defendants for the keeping of accounts of companies such as plaintiff, provides as follows (p. 67):

"Depreciation of Plant and Equipment.—Telephone companies should include in operating expenses depreciation charges for the purpose of creating proper and adequate reserves to cover the expenses of depreciation currently accruing in the tangible fixed capital. By expense of depreciation is meant—

"(a) The losses suffered through the current lessening in value of tangible property from wear and tear (not covered by current repairs).

[fol. 107] "(b) Obsolescence or inadequacy resulting from age, physical change, or supersession by reason of new inventions and discoveries, changes in popular demand, or public requirements, and

"(c) Losses suffered through destruction of property by extraordinary casualties."

The classification of accounts duly and regularly promulgated by the defendants in compliance with law, and in which form plaintiff is required to keep its accounts, does not provide as an element of the expense of depreciation "a coefficient of safety which good business management requires in cases where expense items are to be met, the amount of which cannot be exactly known in advance," nor is such an item of depreciation expense properly allowable.

The second method of determining exxpense of depreciation may be designated the "retirement method." In the application of this method a period of years of the past operations of the property is analyzed to determine the original cost of those items of the plant which have had to be replaced. The sum of these retirements for the period analyzed is divided by the number of years in the period, which gives an average annual retirement in dollars: that is to say, the actual average annual necessities of the utility in providing for retirement of its property over the period analyzed is thus ascertained. This actual experienced expense, when related to the average plant value for the period, gives a depreciation percentage which in a growing plant, is uniformly less than the annual percentage obtained by applying the life table method. Under the retirement method, the reserve, if it exists at all, is very small in its relation to the plant value.

Affiant states that the record made before defendants indicates that the rate for depreciation which plaintiff has heretofore used was too large and its application has resulted in the accrual of a reserve

which is larger than the plaintiff's necessities require and is in excess of the amount the rate payer should be required to provide to cover expense of depreciation. Affiant further says that from the record made before defendants it appears that the property being currently installed by plaintiff is in large part property of longer life, and hence less rapidly depreciable, than the property heretofore installed: that, in view of this fact, and the size of the depreciation reserve, as computed by plaintiff, and the necessary result of the calculation of the expense of depreciation resulting from the application of the method employed by plaintiff, a reduction in the rate of allowance for depreciation expense employed by plaintiff should be made for a period of two years in the future, and that such new rate of depreciation as set forth in the order herein is both reasonable and proper and subject to such future readjustment as the facts may warrant. The effect of this reduction over a period of two years will be to diminish the percentage relation of the depreciation reserve to the cost of the depreciable plant. After proper relation of the depreciation reserve to the cost of the depreciable plant has been once established, the charge to operating expenses on account of depreciation can be more accurately determined.

[fol. 108] Affiant says that in the bill of complaint filed herein there are certain allegations, and, in the supporting affidavits also filed herein, there are certain statements regarding the "cost of property," "book cost of property," "cost of reproduction," and "present fair value" of the properties of plaintiff. That neither in the bill of complaint nor in the supporting affidavits are the details and component figures of these various costs and values set forth, nor are the relation or comparison of these figures, costs and values to the rate base employed by affiant herein set forth. That in the entry of the order herein a valuation for rate making purposes was determined after due and full consideration of all the elements of value required by law to be considered in such a case, and that the valuation herein named by defendants is the just, fair and reasonable value for rate making purposes of the property of plaintiff.

That affiant has read and is familiar with the contents of an affidavit of one C. S. Cassassa, filed herein. That said affidavit contains income statements for the years 1919, 1920, 1921, and 1922, showing the percent net revenue claimed to have been earned by plaintiff form its operations during said years. That affiant has caused these income statements to be changed in two respects and presents the results herewith. That said changes consist in (a) changing the amount of depreciation and amortization allowance to an allowance of three and one-half per centum in accordance with the findings of fact made by the affiant herein, and (b) changing the amount of the allowance to the American Telephone and Telegraph Company under the so-called four and one-half per centum contract to an allowance of ninety cents per station in accordance with the findings of fact of the affiant herein.

1919

Average Cost of Property

Total	$3,823,462	(unchanged)

Telephone Revenues

Total	$932,032	(unchanged)

(a) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Depreciation & Amortization	$36,157	
Total Telephone Expenses (Revised)	783,040	
Net Telephone Revenues	$148,992	
Per cent Net Revenues	3.89%	

[fol. 109] (b) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$16,594	
Total Telephone Expenses (Revised)	$802,603	
Net Telephone Revenues	$129,429	
Per cent Net Revenues	3.38%	

(c) Telephone Expenses

Total	$819,197	(unchanged)
Reduction in Allowance for Depreciat. & Amort. and Licensee Con. Exps.	$52,751	
Total Telephone Expenses (Revised)	$766,446	
Net Telephone Revenues	$165,586	
Per cent Net Revenues	4.33%	

1920

Average Cost of Property

Total	$3,830,672	(unchanged)

Telephone Revenues

Total	$1,098,074 (unchanged)

(a) Telephone Expenses

Total	$1,029,503 (unchanged)
Reduction in Allowance for Depreciation & Amortization	$38,761
Total Telephone Expenses (Revised)	$990,742
Net Telephone Revenues	$107,332
Per cent Net Revenues	2.80%

(b) Telephone Expenses

Total	$1,029,503 (unchanged)
Reduction in Allowance for Licensee Con. Exps.	$22,067
Total Telephone Expenses (Revised)	$1,007,436
Net Telephone Revenues	$90,638
Per cent Net Revenue	2.37%

[fol. 110] (c) Telephone Expenses

Total	$1,029,503 (unchanged)
Reduction in Allowance for Deprec. & Amort. and Licensee Con. Exps.	$60,828
Total Telephone Expenses (Revised)	$968,675
Net Telephone Revenues	$129,399
Per cent Net Revenue	3.38%

1921

Average Cost of Property

Total	$3,890,585 (unchanged)

Telephone Revenues

Total	$1,180,929 (unchanged)

(a) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in allowance for Depreciation & Amortization	$42,940	
Total Telephone Expenses (Revised)	$1,046,521	
Net Telephone Revenues	$134,403	
Per Cent Net Revenue	3.45%	

(b) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$23,715	
Total Telephone Expenses (Revised)	$1,065,746	
Net Telephone Revenues	$115,178	
Per cent Net Revenue	2.96%	

(c) Telephone Expenses

Total	$1,089,461	(unchanged)
Reduction in Allowance for Depreciat. & Amort. and Licensee Con. Exps.	$66,655	
Total Telephone Expenses (Revised)	1,022,806	
Net Telephone Revenues	$158,118	
Per cent Net Revenue	4.06%	

[fol. 111] 1922

Average Cost of Property

Total	$1,113,901	(unchanged)

Telephone Revenues

Total	$1,226,223	(unchanged)

(a) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Depreciation & Amortization	$48,053	
Total Telephone Expenses (Revised)	$1,051,713	
Net Telephone Revenues	$174,510	
Per cent Net Revenues	4.24%	

(b) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Licensee Con. Exps.	$24,246	
Total Telephone Expenses (Revised)	$1,075,520	
Net Telephone Revenues	$150,703	
Per cent Net Revenues	3.66%	

(c) Telephone Expenses

Total	$1,099,766	(unchanged)
Reduction in Allowance for Depreciation & Amort. and Licensee Con. Exps.	$72,299	
Total Telephone Expenses (Revised)	$1,027,467	
Net Telephone Revenues	$198,756	
Per Cent Net Revenues	4.83%	

The controversial matters are the two items of expense. (1) depreciation, (2) compensation to the American Telephone and Telegraph Company under the licensee contract. Defendants have reduced the annual depreciation charge for a period of two years to three and one-half per centum and have fixed the compensation under the said contract at ninety cents per station instead of four and one-half per centum of the gross operating revenue. Such action is not capricious or confiscatory but is fully warranted by the facts. [fol. 112] Further than this deponent saith not, save that this affidavit is made in support of a motion to dissolve the temporary restraining order heretofore issued herein.

E. V. Kuykendall.

Subscribed and sworn to before me this twenty-eighth day of April, 1923. J. H. Brown, Notary Public in and for the State of Washington, Residing at Olympia. (Notarial Seal.)

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

AFFIDAVIT OF ALEX M. WINSTON AS TO VALUE OF, AND EARNINGS OF, THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE—Filed Apr. 30, 1923

STATE OF WASHINGTON,
County of King, ss:

Alex M. Winston, being first duly sworn, on oath deposes and says: That he resides in the City of Spokane, State of Washington; that he is fifty years of age and has been engaged in the practice of law ever since the month of August, 1893; that for the past seven years, he has been the Assistant Corporation Counsel of the City of Spokane, Washington, and, as such, has conducted all litigation of the City of Spokane in State and Federal courts and before commissions; that during that period of time, he has been before the Public Service Commission of the State of Washington and its successors in duties, the Department of Public Works of the State of Washington, in many matters concerning the value of, the income of, and the rates of, public utilities, including rates for telephonic, street car, electric light, electric power and gas companies; that during his said work, he has been compelled to attend many hearings, has consulted with many engineers, and has done much studying of the questions hereinbefore referred to, and especially as to questions concerning values of telephone plants and systems, their earnings, and their rates; that he represented the City of Spokane in the hearings before the Department of Public Works referred to in the bill of complaint herein, and this affidavit is based upon the undisputed testimony admitted and received at said hearings, in addition to the general information possessed by affiant.

That The Home Telephone and Telegraph Company of Spokane is a separate corporate entity from The Pacific Telephone and Telegraph Company, although it is wholly controlled by said latter com-[fol. 113] pany by virtue of stock and bond ownership; that at the said hearings in the bill of complaint herein referred to, by order of March 31, 1923, the Department of Public Works of Washington fixed the value of the property of The Home Telephone and Tele-

graph Company of Spokane, used and useful in the public service, at the sum of $3,892,000; that, prior to 1914, there were two telephone systems in the City of Spokane, one being a part of The Pacific Telephone and Telegraph Company's general system on the Pacific Coast (which will be hereinafter designated the "manual system"), and the other, a much smaller system, the property of The Home Telephone and Telegraph Company of Spokane, an automatic system (which will hereinafter be designated the "automatic system"); that, in order to remove competition, The Pacific Company purchased the proper- of the Home Company and the two systems were consolidated; that at about this time, the franchise of the Pacific Company to operate its system in Spokane having expired and it being unable to obtain a new franchise, an *ob*stensible purchase was made by the Home Company of the Pacific Company's property and, since said time, the exchange in Spokane has been operated by the Home Company as a manual exchange; that the property of the Home Company, as now constituted, consists exclusively of property in the City of Spokane and suburbs, and does not include any long distance lines; that in or about the year 1914, a valuation was placed upon the property of the then Pacific Company of $3,467,675.01, this valuation having been made by the then Public Service Commission of Washington; that in this valuation was included the original manual exchange, together with such property of the automatic exchange as was consolidated with the manual exchange it amounting to about $300,000, according to the books of the Home Company, as they were set up by it on January 1, 1915; the valuation then made as to the manual exchange property was made by the Commission for the purpose of fixing a rate base for rate making purposes; that no allowance was made at said time by the Commission for depreciation, and it is the fact, and was admitted at the hearings referred to in the bill of complaint herein, that said property was in fact in a physical condition of not to exceed 90%; that said order of the Public Service Commission made at said time as to said valuation has never been vacated, modified or appealed from and is still in full force and effect; that, under the statutes of the State of Washington, as construed by the Supreme Court thereof, the said valuation is fixed and final; that since the time of said valuation, additions and betterments have been made to said plant, so that, without taking into consideration the depreciated condition of the plant of The Home Telephone and Telegraph Company of Spokane, its property, used and useful now devoted to the public use, is worth $3,864,081.51; that in this, however, there is not included approximately $100,000 for certain underground conduits and cables not connected with the central office of the company and not devoted to the public use, which have been in existence for a period of more than eight years; that the actual value [fol. 114] of the company's property devoted to the public use, allowing for depreciation, would be $3,478,573; that at the hearings in the present cause, the cost of reproduction of this plant at or near the present time was fixed by the Department of Public Works at $5,

900,000; that the Department of Public Works, however, in its order of March 31, 1923, after considering the condition of the property, its actual performance, appraisal cost, and the cost of reproduction, less depreciation, from all of said figures arrived at the fair value of the property used and useful, devotd to the public use, at the sum of $3,892,000, as of date June 30, 1922; that the Home Company's engineers and accountants at these hearings, following their usual custom, proceeded to find, as did the engineers and accountants for the Commission, that the net earnings of The Home Telephone and Telegraph Company of Spokane, in the year 1921 and, by the use of figures for the first six months of 1922 and the adoption of these figures for the last half of the year 1922, were small; that there was some difference between their figures, occasioned by a reduction of about 20% in the depreciation rate made by the Department's engineers over that allowed by the Company's engineers, and a similar increase by the Department's Engineers over those of the Company's as to the allocation of long distance toll receipts, which will be hereinafter referred to.

Depreciation

That, while there were not available in the statewide case specific allocations of depreciation to the different exchanges in the State of Washington, such information was available in the Spokane case, the Home Company being a separate corporate entity; that the books of the amalgamated company, by which I mean the automatic and manual exchanges, were set up on January 1, 1915; that it is a fact, and was admitted to be such at the hearings by counsel for the utility, that depreciation had accrued prior to that time and that allowances had been made, the nature of which were akin to those thereafter made; that the annual allocation for depreciation, beginning with January 1, 1915, was at the rate of $175,000 per year, and, as admitted by counsel for the Company at that time, a comparatively similar rate of depreciation, considering the amount invested, had been previously charged; that this rate of depreciation was approximately 5.89 per cent; that at the end of the year 1921, from this $175,000 per year placed in the depreciation fund, there had been expended a much less amount, so that at the end of the year 1921 there remained unexpended in said depreciation fund the sum of $751,000, and at the end of the year 1922 an additional sum of $150,000, over and above expenditures to replace depreciated property, had been added to said fund; that at the outset of the period beginning January 1, 1915, the expenditures from the depreciation reserve fund amounted to over $100,000 per year; that they have been constantly and continually decreasing until, in the year 1921, the expenditures from this fund amounted to only $31,000, while at the same time the expenditures from the maintenance fund, [fol. 115] which was somewhat under $100,000 during the first year or two of its creation, have increased about 100%, so that whereas, beginning with 1915, the expenditures for the replacement of de-

preciated property have decreased more than 60%, the expenditures from the maintenance fund have increased about 100%; that it is a fact, and was admitted by the utility at the hearings, that the average plant life of its property was fifteen years and that there was nothing to indicate that the fifteen year period previous to this time was any different from the average period, and that there was nothing to indicate that there were any unusual expenditures from said depreciation fund called for in the near future; that no interest upon the amount in said depreciation fund was charged against the company; that the foregoing statements in regard to depreciation are facts and were undisputed by the company at said hearings; that from such facts affiant avers that said depreciation, as a matter of fact, engineers and accountants to the contrary, is based at a figure 100% in excess of what it should be and that the amount thereof is in fact an actual earning of the Home Company, as will be shown by a tabulation hereinafter in this affidavit to be made.

The Four and One-half per Cent Contract

That it is a fact which was not disputed at the time of the hearings that the only items of services rendered or material furnished by the American Telephone and Telegraph Company to The Home Telephone and Telegraph Company of Spokane which have a fixed or substantial value were the rental of the receivers, transmitters and induction coils; that the other items of service rendered, the monetary value of which was fixed or attempted to be fixed, relate exclusively to services rendered in the transmission of long distance messages; that the items for the use of receivers, transmitters and induction coils were of a value of not to exceed 50% of the whole four and one-half per cent contract: that as to the other items specifically testified to, they were as follows: (1) phantom circuits; (2) repeaters; and (3) loading coils and duplex cables; that it is a fact that as to the phantom circuit, the American Telephone and Telegraph Company (hereinafter called the "parent company") owns no basic patents, and it is a fact that the service rendered in that connection was of no value to the company receiving the same, as it could have had the same service without expense; that it is a fact, and was admitted at the hearing in Seattle, that the phantom circuit was in use during the war, operated successfully in France, and not under the parent company's patents; that it is a fact that as to the repeaters and the loading coils and duplex cables the basic patents thereon have expired; that this fact was admitted by the company; that a claim was made by the company that some minor patents upon these last two items were controlled by the parent company but no evidence was introduced to show what they were or their value, and affiant avers the fact to be that they have no substantial value to the company receiving such alleged service; that, in any event, none of the services rendered under these three last items produces [fol. 116] any advantage, pecuniary or otherwise, to The Home Telephone and Telegraph Company of Spokane.

The Toll Line Allocation

That, under the figures presented by the Company's engineers and accountants at the hearings, there was allocated to the Spokane exchange for all services rendered by it to The Pacific Telephone and Telegraph Company in the handling of, and collecting for, long distance messages, thirty per cent of the amount received for long distance toll messages originating in the Spokane exchange, and nothing for messages handled in Spokane originating in other exchanges; that it is the fact, and it was so admitted by the company at the hearings, that the actual out-of-pocket cost to the Home Company for so handling said messages was in excess of 39%, and in this was not included anything but direct out-of-pocket costs; that there was nothing included therein for any depreciation of any of the property of the Home Company used in the long distance work, nothing for any rental for any space used in such work, nothing for any overhead of any officers assisting in, and directing the carrying on of, such work, and, finally, nothing for profit to the Home Company for its services; that the amount of the expenditures of the Home Company for these items not included is not shown in the record by any testimony; that the approximate value of all of the exchanges in the State of Washington, including the Spokane exchange, and, of course, exclusive of long distance lines, is $19,000,000, in round numbers, and that the value of the long distance lines is $5,000,000; that the net earnings at the present time of the long distance lines, having a depreciation rate of practically six per cent, is fifteen per cent per annum, or $750,000 per year; that affiant further avers that the net earnings of the long distance lines at this time is in excess of sixteen per cent per annum.

Net Earnings of the Home Company

That, applying these figures to Spokane, we find that, without regard to any services actually rendered the Home Company under the four and one-half per cent basis, the percentage of income actually earned on the Company's fair value, without considering depreciation, is 3.78%; add to this the—

Percentage of the 4½% contract services performed exclusively for toll lines	$25,000
Additional income to be added under a fair allocation of toll revenues	80,000
Income actually earned wrongfully charged to depreciation, being based upon actual experience for the average life of the plant	75,000
Total	$180,000

[fol. 117] Percentage of income actually earned on $3,850,000 not appearing on company's books 4.675%

Actual percentage earned by company on its fair valuation, without considering depreciation 8.053%

That affiant further says that the order of the Department of Public Works of the State of Washington herein sought to be stayed was made public on March 31, 1923, and copies thereof received by the respective cities and The Home Telephone and Telegraph Company of Spokane on April 2, 1923; that at no time until the 26th day of April, 1923, did affiant or any person interested in this case, save the complainant, have an opportunity to see and know what affidavits have been presented in support of the application for an injunction pendente lite and that it is a physical and mental impossibility to read and construe said affidavits and to prepare seriatim denials thereof prior to the date of the hearing herein; that affiant avers, however, that as a matter of fact The Home Telephone and Telegraph Company of Spokane is actually earning in excess of eight per cent net upon the fair value of its property, and that he believes that fact will be demonstrated when this cause shall have been tried.

That affiant further avers that he has read the affidavit of R. Lewis Rutter on file herein as to what is a reasonable rate of return; that affiant avers that The Home Telephone and Telegraph Company of Spokane should not be permitted to earn eight per cent upon its fair valuation, nor any sum in excess of six per cent, for the reason that the telephone is a monopoly and a necessity which, for practical purposes, must be had by the people, and, being under the protection of the laws of the state and nation, such rate of return is assured, so that, for all practical purposes, stock in the company issued upon a fair valuation is of the same character as would be a bond; that affiant further says that this rate of return would be upon the buildings owned by the company in Spokane at least twice the average rate actually earned upon investments in business property in Spokane.

Affiant further says that The Home Telephone and Telegraph Company of Spokane is operating its system in the City of Spokane, Washington, under and by virtue of the provisions of Ordi-ance No. A2118 of the City of Spokane, Washington, entitled:

"An ordinance granting to The Home Telephone & Telegraph Company of Spokane the right, privilege and franchise to erect poles and string wires and cables thereon, to construct underground conduits and manholes, and to lay wires and cables in underground conduits and through manholes, and to stretch wires and cables along, over, upon and across the streets, alleys, avenues and public places in the city of Spokane for the transmission of sounds, signals, conversation and intelligence through and over said wires and cables, by means of electricity, and to construct, establish, equip and install a telephone and telegraph system, and to conduct a general telephone and telegraph business within the said city of Spokane, and fixing the compensation to be paid therefor,"

[fol. 118] as amended by Ordinance No. A 4079 of said city, passed by the City Council April 13, 1909, and approved by the Mayor thereof April 14, 1909, the original franchise ordinance having been adopted by a vote of the people of the City of Spokane at an election

held August 11, 1905, pursuant to Amendment No. 61 of the Charter of the City of Spokane; that Section 11 of said Ordinance No. A 2118 is in words, letters and figures as follows:

"Section 11. That all telephone lines constructed or operated under said franchise shall have complete copper metallic circuits, and that the conduit system constructed and laid down under this franchise shall be of such size and capacity as to accommodate wires, cables or conductors sufficient to provide for ten thousand (10,000) telephones.

"That the rent or charge for an unlimited, independent metallic circuit telephone service in the system established or maintained under this franchise, so long as such system does not connect an exchange with more than four thousand (4,000) telephones, shall not exceed four and twenty-five one-hundredths dollars ($4.25) per month; and said charge, so long as such system does not connect an exchange with more than ten thousand telephones, shall not exceed six and twenty-five one-hundredths dollars ($6.25) per month; and that in no event shall said rent or charge exceed eight and twenty-five one-hundredths dollars ($8.25) per month for a telephone installed in any business office or premises for business purposes; and shall not exceed two and twenty-five one-hundredths dollars ($2.25) per month for a telephone installed in a private residence; Provided that a discount of twenty-five cents per month shall be made for cash payment on or before the tenth day of the month in which the service is rendered."

That said ordinance is still in full force and effect and that it has been adjudicated by the Supreme Court of the State of Washington that said franchise constitutes a valid contract between The Home Telephone and Telegraph Company of Spokane, and the city of Spokane, and its inhabitants, save as it may be terminated by the Department of Public Works of the State of Washington, or by its predecessor in office, and that the said contract has never been terminated by the Public Service Commission of Washington or the Department of Public Works of Washington, save by an order permitting the putting into effect of those rates specified in Exhibit "A" attached to the bill of complaint herein and found on pages 18 and 19 thereof.

Alex. M. Winston.

Subscribed and sworn to before me this 27th day of April, 1923. H. F. Jones, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 119] IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

ORDER DISSOLVING RESTRAINING ORDER AND DENYING INJUNCTION—Filed Apr. 30, 1923

This matter coming on for hearing before Hon. William B. Gilbert, Circuit Judge, and Hon. Edward E. Cushman and Hon. Jeremiah Neterer, District Judges, upon plaintiffs' application for an interlocutory injunction and the defendants' motion to dissolve the restraining order heretofore issued,

It is ordered that the restraining order be dissolved and that an interlocutory injunction be denied.

Opinion will be later filed.

Ordered, this 30th day of April, A. D. 1923.

Wm. B. Gilbert, Circuit Judge. Edward E. Cushman, District Judge. Jeremiah Neterer, District Judge.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

DECISION ON APPLICATION FOR AN INTERLOCUTORY INJUNCTION—Filed May 23, 1923

Before Hon. William B. Gilbert, United States Circuit Judge; Hon. Edward E. Cushman and Hon. Jeremiah Neterer, United States District Judges

OPINION

These causes are before the court upon applications for temporary injunctions under Section 266 of the Judicial Code (Section 1243 Compiled Statutes) and also upon defendants' motions to dissolve the restraining orders heretofore made.

The complaint in cause No. 166-E alleges that plaintiff operates a telephone and telegraph system in the State of Washington and elsewhere; that the defendants are officers of the State of Washington, as recited in the title hereto; that the order of the Department of Public Works of the State, prescribing maximum rates to be charged by plaintiff for its telephone service, is confiscatory and would deprive plaintiff of its property without due process of law; that, in Septem-

[fol. 120] ber, 1922, plaintiff filed a schedule of rates, increasing its charges, which was suspended by the Department and an order made

that plaintiff withdraw such schedule of rates filed and file a schedule conforming to its schedule in effect prior to the war period, which plaintiff did, save as to charges applicable to the Cities of Seattle and Tacoma; that numerous hearings were had by the Department for the purpose of determining the value of plaintiff's property and the reasonableness of its rates; that a ruling of the Department was made, one member dissenting, denying plaintiff's application for an increase in all respects. The dissenting member found the rates fixed, both toll and exchange, unreasonably low and found the rates filed by plaintiff in compliance with defendants' order to be reasonable.

It is averred that the cost of plainttiff's property in the state—exclusive of that furnishing telephone service to Spokane and adjacent territory (which latter is the subject of suit No. 167-E), was, on December 31, 1922, $29,347,254.00; that the cost of its Seattle property was $17,023,372.00; and the cost of its Tacoma property $2,888,021.00; that the cost of such property has been increased since such date by additions and betterments; that the cost to plaintiff of its property was taken by the Department, substantially, as the rate base in fixing its charges in the order attacked; that the cost of reproduction as of the above date was, for the state, not including Spokane, $48,087,785.00; for Seattle, $27,149,130.00; and for Tacoma, $4,998,964.00; that the cost, less depreciation of such date, for the state was, $24,919,930.00; and for Tacoma, $4,534,264.00; that the fair and reasonable value of such property as of such date was: for the State, $35,616,896.00; for Seattle, $20,852,067; and for Tacoma, $3,457,290.00.

The complaint further alleges that:

"The foregoing statements as to the cost to plaintiff of said respective properties include nothing on account of the item of franchises, or the item known as going concern value, but said latter item has been considered in determining the present cost of reproduction and the present fair and reasonable value of said property."

Not less than eight per cent. upon the reasonable value is alleged to be a fair annual rate upon its business.

It is alleged that plaintiff's net return upon such property under the rates ordered for the years 1919, 1920, 1921, and 1922, based upon property cost, has ranged, for the state, from a maximum, in 1919, of 4.97% to a minimum in 1922, of 3.17% for Seattle, from a maximum, in 1919, of 3.97%, to a minimum, in 1922, of .19%; and for Tacoma, from a maximum in 1919 of .98% to a minimum in 1921 of .58%. That its rate of return during such years, based upon the fair value of its property ranged, for the state, from a maximum in 1919, of 3.67%, to a minimum in 1921 and 1922, of 2.58%; for Seattle, from a maximum in 1919, of 2.66%, to a minimum, in 1922, of .15%; and for Tacoma from a maximum of .81% in 1919, to a minimum, in 1921, of .48%. That the net revenue [fol. 121] received for such years fell short of eight per cent. upon the cost of its property in varying amounts, ranging for the state

from a maximum in 1922, of $1,310,651.00, to a minimum in 1919 of $537,242.00; for Seattle, from a maximum in 1922, of $1,192,580.00, to a minimum, in 1919, of $312,793.00; and for Tacoma, from a maximum in 1921, of $205,110.00, to a minimum, in 1919, of $187,587.00.

It is further alleged that, if the rates ordered are enforced and efficient service is maintained, it will result in the confiscation of plaintiff's property and prevent it from earning any return upon the fair and reasonable value of its property in the State in excess of 2.11% per annum; that 54% per annum loss would result upon the value of its Seattle property and .56% upon its Tacoma property.

It is alleged that, were the rates of the dissenting order in effect for 1923, plaintiff's return upon the fair and reasonable value of its property in the state would be 5.09%; for the City of Seattle, 2.81%, and for Tacoma, 3.96%; that, based upon the cost of its property, for the same period, plaintiff's rate would be, for the state, 6.15%; for the City of Seattle, 3.42%; and for the City of Tacoma, 4.73%; that such *that such* last mentioned rates are unreasonably low; but that plaintiff proposes to put them in effect pending final decree and asks relief by way of an interlocutory injunction enabling it so to do.

In the above entitled cause, No. 167-E, involving the Spokane rates, alone, the complaint asks the same relief and, in so far as its allegations differ from the foregoing, avers:

That the cost of the property in the Spokane exchange (land being included at present value), was, on the 31st day of December, 1922, $4,266,899.00; that the cost at present is in excess of this amount; that the cost above given is the rate base used by the Department in the order attacked; that the cost of reproduction as of December 31, 1922, would be $8,039,784.00; that the cost of reproduction, less depreciation as of that date, would be $7,382,484.00; that the fair and reasonable value of the Spokane exchange property is $5,710,684.00. That plaintiff's net earnings for the years 1919, 1920, 1921 and 1922, calculated upon the cost of the property, give plaintiff an annual return ranging, from a maximum, in 1922, of 3.07%, to a minimum, in 1920, of 1.79%; that its net earnings for the same years, calculated on the fair value of its property, give returns ranging from a maximum, in 1922, of 2.28%, to a minimum, in 1920, of 1.30% That for such years the net revenue failed to make a return of eight per cent upon the cost, in amounts ranging from a minimum, in 1919, of $193,042.00, to a maximum, in 1920, of $237,883.00. That, if the Department's order is enforced, plaintiff would be prevented from earning, in 1923, any return in excess of 1.88% per annum upon the fair and reasonable value of its property. That, if the order of the dissenting member of the Department—which plaintiff asks to have put in effect pending final decree—is enforced, plaintiff would earn, for such time, 5.52% upon the fair value of its [fol. 122] property, which would amount to but 7.64% upon its cost.

It is shown herein that the proceedings before the Department, resulted in the rate order attacked by the complaint, were instituted upon the complaint of the Department, after which the City of

Seattle filed its supplemental complaint therein attacking plaintiff's then existing rates.

The Department held:

"that a determination of the telephone rates for Seattle and King County could only be made, legally, after the filing of a formal complaint, an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington * * *.

"The Department's engineering and accounting staff, was forthwith directed to proceed with and to make, in co-operation with engineers and accountants employed by the cities or other interested complainants, a thorough and complete analysis, investigation and report on all matters which could and should be sonsidered in a final determination of the matter before the Department."

The causes were consolidated for hearing by the Department. On December 14, 1922, the Washington Hotel Men's Association filed its complaint. Representatives of the Cities of Tacoma and Spokane took part in the hearing. These hearings resulted in the Department's order attacked herein by plaintiffs.

At the conclusion of a number of hearings, the Department found:

"Finding

The value of the telephone properties of the Pacific Telephone and Telegraph Company in the State of Washington, including the Spokane Exchange, used and useful in public service, was, as of June 30, 1922, $32,108,853.76 which amount is fixed as the rate base as of that date.

Discussion

The respondents in this case have contended for a value (termed by them fair value) in the amount of $40,000,000. This contention is fully answered, to the contrary, by our own Supreme Court in State ex rel. Spokane Gas Light Company vs. Kuykendall, 119 Wash., 107.

* * * * * * *

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922. [fol. 123] "In these findings and this order, all of the property of the Pacific Telephone and Telegraph Company and the Home Telephone and Telegraph Company of Spokane will be treated as one system and the property in Spokane will be treated as an exchange of the Pacific Telephone and Telegraph 'System.' Technically, the Home Telephone and Telegraph Company of Spokane is a separate entity, but it is common knowledge that it is maintained as a separate entity for franchise purposes only. All of the stock of the Home Com-

pany, except a few directors' qualifying shares, is owned by the Pacific Company and for all practical purposes the Spokane plant is in fact an exchange or part of the Pacific System just as are Seattle and Tacoma; therefore, the valuation made of the Spokane Exchange is treated as an integral part of the state-wide system and the rates to be fixed herein will bear the same relation to the system as do the rates for Seattle and Tacoma. * * *

"Finding

We find that the annual depreciation charge should be reduced from approximately 6% to 3½% for the period of two years from April 1st, 1923. * * *

"Finding

We find that the Four and One-half per cent Contract between the Pacific Telephone and Telegraph Company and the American Telephone and Telegraph Company is wrong in principle, contrary to public policy and the compensation thereunder should be computed on the per station basis rather than a percentage of revenue. We find a reasonable charge per annum for the services rendered under said contract to be 90 cents per station. * * *

"In the case of the City of Houston vs. Southwestern Bell Telephone Company etc., U. S. Supreme Court Advance Opinions 1921-1922, No. 16, July 1, 1922, p. 539, is cited by respondents as supporting the contract but the opinion clearly states that the fact that one company owns stock in another 'requires close scrutiny of their dealings to prevent imposition upon the community served by the company.' "

In Cause No. 166-E, the Attorney General has moved for a stay of this suit, pending the final determination of a suit brought in the Superior Court of Thurston County, ex rel. City of Seattle, on the ground that the latter suit is one to enforce the order sought to be enjoined herein.

Section 266 of the Judicial Code (Section 1243 Comp. Stats.), in part, provides:

"* * * It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the deter- [fol. 124] mination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith."

An examination of the record in the suit in Thurston County on the relation of the City of Seattle shows that this suit is one also attacking the rate ordered by the Department, and asks an even lower rate than that provided by the order for Seattle. It is shown that an order has been made by the Superior Court in such suit, in part, as follows:

"Ordered that the said respondents, E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation, of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission of Law,' and The Pacific Telephone and Telegraph Company, a corporation, appear before this court on said return date, at the said hour of 10.30 A. M., at which time a hearing will be had upon the reasonableness and lawfulness of the said order which was entered on the 31st day of March, 1923, as aforesaid, said hearing to be conducted as provided by law, and at said time this court may further cause to be done whatever it may appear of right ought to be done, and in the meantime that they, and each of them, and said Company desist from filing, or attempting to file, new or other or alternative telephone tariffs and schedules of telephone rates in the premises."

The rates to be established for the state must be, to a certain extent at least, inter-dependent. Yet it would seem that the suit in the Superior Court, being brought on relation of the City of Seattle, would not, in the absence of intervention, necessarily be res judicata either of the rates throughout the state, or those of Tacoma or Spokane. Yet it is clear that the Department's course in holding that the questions involved could only be satisfactorily determined after "an investigation and study of the entire system of the Pacific Telephone & Telegraph Company in the State of Washington" was entirely proper. This system and the rate to be fixed, based upon its ascertained value, are in the nature of a res. Therefore, while questions determined in the absence of interested parties, if any, may not strictly be res judicata, yet under the necessities of the case, all the rights and duties of all interested would necessarily be considered, and found, if not determined.

The foregoing consideration, coupled with the fact that the suit brought in the Superior Court is not one to enforce the rate order attacked by plaintiffs, but is, itself, one making an attack thereon, renders the proviso of Section 266 of the Judicial Code not strictly [fol. 125] applicable. It does not follow, however, that consideration of the institution of such suit is to be ignored, or that it is without effect. This matter will be later considered.

By sections 10424 and 10431, Remington's Compiled Statutes 1922, it is provided:

"Sec. 10424. Whenever any public service company shall file with the commission any schedule, classification, rule or regulation, the effect of which is to increase any rate, fare, charge, rental or

toll theretofore charged, the commission shall have power, either upon its own motion or upon complaint, upon notice, to enter upon a hearing concerning such proposed increase and the reasonableness and justice thereof, and pending such hearing and the decision thereon the commission may suspend the operation of such rate, fare, charge, rental or toll for a period of ninety (90) days from the time the same would otherwise go into effect, and after a full hearing the commission may make such order in reference thereto as would be provided in a hearing initiated after the same had become effective: Provided, that if any such hearing cannot be concluded within the period of suspension, as above stated, the commission may, in its discretion, extend the time of suspension for a further period not exceeding sixty (60) days.

"At any hearing involving any change in any schedule, classification, rule or regulation the effect of which is to increase any rate, fare, charge, rental or toll theretofore charged, the burden of proof to show that the changed schedule, classification, rule, or regulation, or the increased or proposed increased rate, fare, charge, rental or toll, is just and reasonable shall be upon the public service company.

"The commission shall give to the hearing and decision of such questions preference over all other questions pending before it and shall decide the same as speedily as possible.

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court." (Laws of 1915, p. 362, Sec. 1. Cf. Laws of 1911, p. 594, sec. 82.)

"Sec. 10431. Any public service company affected by any order of the commission, and deeming itself aggrieved, may, after the expiration of two years from the date of such order taking effect, petition the commission for a rehearing upon the matters involved in such order, setting forth in such petition the grounds and reasons for such rehearing, which grounds and reasons may comprise and consist of changed conditions since the issuance of such order, or by showing a result injuriously affecting the petitioner which was not considered or anticipated at the former hearing, or that the effect of such order has been such as was not contemplated by the commission or the petitioner, or for any good and sufficient cause which for any reason was not considered and determined in such former hearing. Upon the filing of such petition, such proceedings shall be had thereon as are provided for hearings upon complaint. [fol. 126] and such orders may be reviewed as are other orders of the commission: Provided, that no order superseding the order of the commission denying such rehearing shall be granted by the court pending the review. In case any order of the commission shall not be reviewed, but shall be complied with by the public service company, such petition for rehearing may be filed within six months from and after the date of the taking effect of such order, and the proceedings thereon shall be as in this section provided.

The commission, may, in its discretion, permit the filing of a petition for rehearing at any time. No order of the commission upon a rehearing shall affect any right of action or penalty accruing under the original order unless so ordered by the commission." (Laws of 1911, p. 599, sec. 89.)

It has been contended upon the part of the defendants that the present suit has been prematurely begun because no prtition for a re-hearing has been presented by plaintiffs to the Department of Public Works—which is the successor of the Public Service Commission (Remington's Compiled Statutes section 10784—asking for a re-consideration of its rate order.

In view of the discretionary character of proceedings upon rehearing and the provision made in the sections quoted denying the right of supersedeas—which latter, while expressly only made applicable to the court's review of the Department's order, it may be assumed, would, in its discretion, be adopted by the Department—it is concluded that the suits have not been prematurely begun upon this ground.

William A. Prendergast, et al. vs. New York Telephone Company (Decided by U. S. Sup. Ct. Apr. 16, 1923).

It was stated upon the argument of the application for a preliminary injunction that, after service of the restraining order, plaintiffs had filed the schedule of rates directed in the order, being those asked pending final determination of the suit. Defendants contend that this constituted an abandonment by plaintiffs of the rate schedules involved in the Department's hearings and findings. The court concludes that such filing was but a step taken by plaintiffs in rendering affective the restraining order and that its result was not to render the issues involved in those suits merely moot questions.

It has been further suggested that these suits have been prematurely begun because plaintiffs did not, prior to their institution, seek a review of the Department's order by the State court. Sections 10428 and 10429 Remington Compiled Statutes provide:

"Sec. 10428. Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and [fol. 127] after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it.

Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action." (Laws of 1911, p. 596, sec. 86.)

It will be noted from the foregoing section that, upon review, the court may only render judgment either affirming or setting aside the order of the Commission, unless the court should hold that the language of this section:

"The court may, in its discretion, remand any cause which is reversed by it to the commission for further action."

gives the court a wider discretion. Unless it is so held, the court is given no power by that section to make its own findings or fix rates. For this reason, as far as this statute is concerned, the suit has not been begun prematurely. (Bacon v. Rutland R. R. Co., 232 U. S., 134, at 137.)

The plaintiff, The Pacific Telephone and Telegraph Company (Cause No. 166-E), in describing the hearings had by the Department resulting in its order attacked herein alleges:

"That subsequent to the dates hereinbefore mentioned and between December 18, 1922, and March 1, 1923, said Department held numerous hearings in the State of Washington for the purpose of determining the value of plaintiff's property used or useful in rendering telephone service in the State of Washington; the reasonableness or unreasonableness of the rates and charges then being charged by plaintiff in said estate; the reasonableness or unreasonableness of the schedule of rates and charges applicable to the toll service filed as aforesaid by plaintiff on October 5, 1922; and the reasonableness or unreasonableness of the schedule of exchange rates applicable to Seattle and Tacoma filed as aforesaid on September 20, 1922. * * * That the cost to plaintiff of its property in the State of Washington, in the City of Seattle and in the City of Tacoma is now somewhat in excess of the amounts hereinbefore mentioned on account of the additions and betterments in the meantime made to said respective properties. That the cost to plaintiff of its property in the State of Washington and in the cities of Seattle and Tacoma [fol. 128] is substantially the rate base fixed by the Department of Public Works in its said order of March 31, 1923, as of the 30th day of June, 1922, with additions and betterments thereto made since that time."

Similar allegations are contained in the complaint in cause No. 167-E.

The outline above of the complaints in the two suits shows that

there is involved a controversy as to the value of the properties; that is, the determination of the rate base.

Section 10441 Remington's Compiled Statutes (which is described in one of its titles as appearing in the 1913 session laws of the State; "Valuation of Public Service Properties as Fixed for Rate Purposes, Not to be Used for Taxing Purposes") provides:

"The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company. * * *

"The commission is hereby authorized to cause a hearing or hearings to be held at such time or times and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

"The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

"All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

"The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

"Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted, or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. [fol. 129] Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in

rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

"Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

"The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts herein determined.

"The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, [fol. 130] and the value of the property of such company in the state used for the public convenience of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings; Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing." (Laws of 1911, p. 601, sec. 92; Laws 1913, p. 662, sec. 1).

Section 10429 Remington's Compiled Statutes provides:

"The pendency of any writ of review shall not of itself stay or suspend the operation of the order of the commission, but the superior court in its discretion may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

"No order so restraining or suspending an order of the commission relating to rates, fares, charges, tolls or rentals, or rules or regulations, practices, classifications or contracts affecting the same shall be made by the superior court otherwise than upon three days' notice and after hearing, and if a supersedeas is granted the order granting the same shall contain a specific finding, based upon evidence submitted to the court making the order, and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner, and specifying the nature of the damage; Provided, however, that when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court by such supreme court.

"In case the order of the commission under review is superseded by the court, it shall require a bond, with good and sufficient surety, conditioned that such company petitioner for such review shall answer for all damages caused by the delay in the enforcement of the order of the commission, and all compensation for whatever sums for transportation, transmission or service any person or corporation shall be compelled to pay pending the review proceedings in excess of the sum such person or corporation would have been compelled to pay if the order of the commission had not been suspended.

"The court may, in addition to or in lieu of the bond herein provided for, require such other or further security for the payment of such excess charges or damage as it may deem proper." (Laws of 1911, p. 597, sec. 87).

The findings of the Department show that its hearings and findings were made in pursuance of section 10441 above.

It clearly appears from the foregoing that, upon a review of the Department's proceedings, neither the Superior nor the Supreme [fol. 131] Court is limited to a judgment of affirmance or reversal; but that the Superior court may

"In case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

and that

"In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

It thus clearly appears that both courts have legislative authority in determining the rate base, superior to that of the Department.

Considerations of "comm*u*nity and convenience" require the court to hold that, until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed.

Prentis vs. Atlantic Coast Line, 211 U. S., 210;

The Public Utilities Commission of the District of Columbia vs. Potomac Electric Power Company, et al., (Decided by U. S. Sup. Ct. Apr. 9, 1923)

William A. Prendergast, et al. vs. New York Telephone Company, (Decided by U. S. Sup. Ct. Apr. 16, 1923)

Bacon v. Rutland R. R. Co., 232 U. S., 134.

Granted the power, it is not practicable for the Department, the State or Cities to indemnify the plaintiffs in these cases, should plaintiffs in the end prevail and establish the right to higher rates. The reason that it is impracticable is on account of the inconvenience and disproportionate cost to the Department, State and Cities in securing indemnity from each of the telephone users against the contingency of the higher rates being determined in the end the proper rates. It is obvious, on account of changes in those making use of the service furnished by the plaintiffs and the small amounts involved in the individual transactions that it is unreasonable to ask them to look to such users for such indemnity should they ultimately prevail. It is, therefore, clear that—should the [fol. 132] showing made establish with reasonable certainty the confiscatory nature of the rates ordered—plaintiffs, upon giving an adequate bond for the protection of those concerned, in case plaintiffs fail to establish their contention, are entitled to have the objectionable rates stayed pending final determination.

The extent of the stay in the Thurston County case is not made clear. It will be assumed that it does not stay the enforcement of the rate attacked by plaintiffs. While the Thurston County case is not one brought to "enforce" the Department's "order," it is one seeking a lower rate than that of such order and, therefore, puts the Department to the defense of the order which plaintiffs here attack in cause No. 166-E.

The Pacific Telephone and Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff herein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.

Prentis v. Atlantic Coast Line, 211 U. S., 210;
Bacon v. Rutland R. R. Co., 232 U. S., 134 at 137;
Oklahoma Natural Gas Co. vs. Campbell Russell, et al., (Decided by Sup. Ct. of U. S. Mar. 5, 1923)

The same considerations which require that the preliminary injunction be denied, necessitate the dissolution of the restraining order. Reaching this conclusion, the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered.

Judge William B. Gilbert, concurs.

Judge Jeremiah Neterer, concurring, states:

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

[Title omitted]

CONCURRING OPINION—Filed May 23, 1923

NETERER, D. J.: I agree with the conclusion of Judge Cushman that on consideration of comity and convenience this court should not interfere where the plaintiff has open a higher court of the state, The Prentis Case, 211 U. S., 210; Puget Sound Elec. Ry. Co. v. Lee, 207 Fed. 501, until the State remedy is exhausted. The plaintiff by its acts has become an adopted creature of the State, en- [fol. 133] joying the rights and privileges provided by its law, and is subject to the control thereof. The State accords it a right of eminent domain, and it becomes amenable to the Washington Public Service Commission Law. This law provides for establishing reasonable rates for public service. Provision is made for hearing and finding, and for review, Rem. C. 10428 before the Superior Court and for appeal to the Supreme Court from such judgment, R. C. 10430.

This court has jurisdiction by reason of the Fifth and Fourteenth amendments only. It has no revisory power and may not amend or modify a rate in the chancery sense, but is confined to the judicial determination of the controversy on the facts, and may

not enter the administrative or legislative issue, Public Utilities, etc. v. Potomac Elec. Power Co. U. S. Supreme Court, April 9, 1923. I also desire to say that in my opinion the majority of the Commission have the right conception that consideration should be given to the $2,500,000 (round numbers) in the depreciation surplus fund, and adjusted compensation for the 4½ per cent contract with the Parent Company. Whether the proper consideration was given is not now before the court.

(Signed) Jeremiah Neterer.

[File endorsement omitted.]

[fol. 134] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO COMPEL ANSWER—Filed July 5, 1923

To the Honorable E. E. Cushman, Judge of the above entitled court:

Comes now The Home Telephone and Telegraph Company of Spokane, a corporation, plaintiff above named, and moves the court for an order requiring the defendants above named to file forthwith with the Clerk of this court, an answer to the bill of complaint in the above entitled cause, and serve the same upon the plaintiff herein, or in the default thereof that a decree pro confesso be entered against said defendants.

This motion is based upon the following grounds, to-wit:

That plaintiff's bill of complaint was filed herein on the 24th day of April, 1923, and was on the 26th day of April, 1923, duly served upon the defendants herein; that thereafter, to-wit, on the 8th day of May, 1923, the plaintiff at the request of defendants, extended, by [fol. 135] stipulation, the time of defendants to answer said bill of complaint to and including the 18th day of June, 1923, and no further; that said defendants have not filed or served any answer to said bill of complaint.

That there is no justification or reason arising from any act of the plaintiff or from the facts in this case, which would relieve the defendants from serving and filing the answer to plaintiff's bill of complaint as required by law, and the rules of the court, nor does the order heretofore entered in this cause on April 30, 1923, by its terms, relieve said defendants from serving and filing an answer to said bill of complaint, nor are said defendants relieved from serving and filing an answer to said bill of complaint during the pendency in the Superior Court of the State of Washington, in and for Thurston County, of a certain cause entitled "The State of Washington, ex rel. The City of Seattle, a municipal corporation, Petitioner and Relator, v. E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons con-

stituting that portion of the Department of Public Works of Washington, exercising jurisdiction in the Division of Public Utilities under the Public Service Commission Law,' and The Pacific Telephone and Telegraph Company, a corporation, Respondents."

This motion is further based upon all the files and records filed in said cause.

Otto B. Rupp, Post, Russell and Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, of Counsel.

[File endorsement omitted.]

[fol. 136] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER DENYING MOTION TO COMPEL ANSWER—Filed July 9, 1923

On the 9th day of July, 1923, there came on regularly for hearing on application of plaintiff, defendants' motion to dismiss heretofore filed herein, and plaintiff's motion for an order requiring defendants to answer plaintiff being represented by Otto B. Rupp, Esq., Post, Russell & Higgins, Pillsbury, Madison & Sutro and W. V. Tanner, Esq., and defendants being represented by Hon. John H. Dunbar, Attorney General and other counsel, and the court having heard argument of counsel, and being fully advised herein,

It is now ordered that said motion to require the defendants to answer be and the same is hereby denied, and the court declines to pass upon defendants' motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein on May 23, 1923.

This order is made without prejudice to the defendants' rights to file any motion to dismiss or abate the action by reason of any matters occurring after its commencement. To all of which plaintiff excepts and its exception is allowed.

Dated, Tacoma, Washington, July 9, 1923.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 137] IN THE UNITED STATES DISTRICT COURT

COPY OF JOURNAL RECORD OF OCTOBER 22, 1923, SHOWING ORDER OF COURT DISPOSING OF ORDER OF JULY 9, 1923

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on October 22nd, 1923, among other proceedings had, were the following, truly taken and correctly copied from Equity Journal record of said Court as follows:

[Title omitted]

Now on this 22nd day of October, 1923, it is ordered that the Order of July 9, 1923, formerly made in this cause be set aside and vacated and the motion of defendants to dismiss the Bill of Complaint is set down for hearing on Monday, October 29, 1923, at 10 o'clock A. M., and the Clerk is instructed to advise all parties of this order by mail.

[fol. 138] In the District Court of the United States

[Title omitted]

Affidavit in Support of Motion to Dismiss—Filed October 29, 1923

E. V. Kuykendall being first duly sworn on oath deposes and says: That he is the duly appointed, acting and qualified Director of the Department of Public Works; that on April 28, 1923, The Home Telephone and Telegraph Company of Spokane, a corporation, Plaintiff herein, filed a tariff with the Department of Public Works of the State of Washington known as Tariff W. D. P. W. No. 4, that subsequent thereto action was taken on said tariff by the Department of Public Works as more fully set up and described in the Findings of Fact and Order of the Department of Public Works, No. 5547, which is in words and figures as follows, to-wit:

[fol. 139] "Before the Department of Public Works of Washington

No. 5547

The Department of Public Works of Washington, Complainant,

v.

The Home Telephone and Telegraph Company of Spokane and The Pacific Telephone and Telegraph Company, Respondents.

Findings of Fact and Order

This cause was set and duly noticed for hearing on the 24th day of October, 1923, by the Department. The respondents made no formal appearance and no testimony in support of the tariffs hereafter refered to was submitted. The Department being fully advised in the premises makes and enters the following findings and order:

Findings of Fact

I

On September 20, 1922, the respondents filed with the Department exchange rate schedules proposing revised increased rates applicable to all exchanges of these companies in the State of Washington.

II

On September 24, 1922, the Department issued an order suspending the effective date of such rates and directing that the companies file for consideration of the Department a toll rate schedule conforming in principle to their prewar toll rate schedules.

III

On October 5, 1922, the said telephone companies filed the toll [fol. 140] rate schedules as directed and concurrently therewith filed with the Department a withdrawal and cancellation of their proposed increased rate schedules except as applying to Seattle, Spokane and Tacoma. Protests against the said schedules were filed by each and all of said cities, and the same were suspended by order of the department, and after extensive investigations and hearings, the department entered an order on the 31st day of March, 1923, denying such increases and permanently suspending such tariffs.

IV

On the 28th day of April, 1923, the Home Telephone and Telegraph Company of Spokane, respondent, filed with the department its Tariff W. D. P. W. No. 4, providing exchange rates and charges for other services in the City of Spokane, Washington, and the Pacific Telephone and Telegraph Company, respondent, on the same date filed its Tariff W. D. P. W. No. 4, providing exchange rates and charges for other services in the cities of Seattle and Tacoma, and its tariff naming interexchange rates applying upon intrastate traffic within the State of Washington, and upon interstate traffic, all to become effective May 28, 1923. It appearing that the said tariffs named rates in excess of those in effect, the department issued an order suspending the effective date of each and all of said tariffs for a period of ninety days from May 28, 1923. A second suspension order of similar character was entered by the department on the 18th day of August, 1923, further suspending the effective date of said rates for the period of sixty days from August 25, 1923, or to and including October 25, 1923.

[fol. 141] V

On October 15, 1923, the Department gave due and legal notice of a hearing in respect to said tariffs at Olympia, Washington, at the hour of 10:00 o'clock A. M., on October 24, 1923.

VI

On October 19, 1923, the said respondents, by their attorney Otto B. Rupp, submitted to the Department of Public Works a statement in writing in words and figures as follows, omitting title and signature, to-wit:

"On October 16, 1923, there was served on the agent of the company at Olympia, Washington, a 'Notice of hearing re Tariffs covered by our suspension orders dated May 25, 1923, and August 18, 1923, increasing telephone rates particularly in Seattle, Tacoma and Spokane, at Olympia on October 24, 1923, at the hour of ten A. M.'

Your Honorable Body will recall that on April 24, 1923, the Pacific Telephone and Telegraph Company brought a suit in the United States District Court for the Western District of Washington, Southern Division, in which it sought, among other things, to enjoin the enforcement of an order made by your Honorable Body on March 31, 1923, and that on April 24, 1923, that court issued an order in which, among other things, it restrained your Honorable Body, the Attorney General of the State of Washington and all other persons from interfering with or preventing the company from immediately putting into effect the rates and charges set forth in a schedule marked 'Exhibit F' and attached to the bill of complaint filed in that case.

After the issuance of this order, and on April 28, 1923, the company filed with your honorable body the rates and charges set forth in said schedule 'Exhibit F.' At the time the company filed such rates and charges, it notified your honorable body in writing that the schedule 'is made effective May 1, 1923, under the authority of an order issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, in cause No. 166-E.'

Your Honorable Body on the same date stamped on said schedule the following: 'Tariff accepted as tendered for filing.'

[fol. 142] On April 30, 1923, a court convened as provided for by Section 266 of the Judicial Code of the United States, dissolved the restraining order isued by Judge Cushman on April 24, 1923.

The company has always conside-d, and has so stated in open court, that the filing of such schedule was but a step taken by it in rendering effective the restraining order issued on April 24, 1923, and the three-judge court convened as above stated so held in an opinion rendered by that court and filed on May 23, 1923, in the case above referred to.

The company never did charge its patrons the rates set forth in said schedule 'Exhibit F,' for the reason that prior to the filing of said schedule, the restraining order which was the basis of the filing of said schedule, was dissolved.

In order to remove all doubt as to the company's position, the company does hereby state that the dissolution of the restraining order ipso facto cancelled the filing made as aforesaid on April 28,

1923, and that the rates and charges set forth in schedule 'Exhibit F' never became the effective rates and charges."

On the same date a statement was submitted identical with that above quoted with the exception that the Home Telephone and Telegraph Company of Spokane is named wherever the Pacific Telephone and Telegraph Company is mentioned in the above quoted statement. The said written statements, and each of them, duly signed by Otto B. Rupp, attorney for each of the said respondent companies, were filed with this Department on October 20, 1923.

VII

That the tariffs referred to in the above mentioned written statements as having been issued by the authority of an order issued April 24, 1923, by the District Court of the United States for the Western District of Washington, Southern Division, Cause No. 166-E and Cause No. 167-E, constitute the same tariffs and schedules involved in this controversy and mentioned in the suspension orders heretofore recited.

[fol. 143]

VIII

That the rates prescribed in the said tariffs never became effective and could not legally take effect unless and until a rehearing had been granted in Cause No. 5344 wherein the Department denied increased rates to the respondents and permanently suspended tariffs contained proposed increases. No rehearing in the aforesaid cause has been granted by this department, and the written statements filed herein by respondents above quoted clearly indicate that the filing of the said proposed tariffs and schedules as of April 28, 1923, was not in the nature of a request for a rehearing by this department in said Cause No. 5344, and was not intended to bring about a modification by the department of its own order entered in said cause.

IX

The respondents have failed to show by competent evidence or at all that the said proposed increased rates, fares, charges or tolls are just or reasonable, and have failed to sustain the burden of proof resting upon the respondents to show that the proposed rates, fares, charges, or tolls are just and reasonable.

X

The department finds that the proposed rates, fares, charges and tolls contained in said tariffs, are unfair, unjust, excessive and unreasonable.

[fol. 144] Order

Wherefore, it is ordered that the said applications of respondents for increased rates be and the same are hereby denied. That the proposed rates embrace in said tariffs and schedules heretofore refered to and filed on April 28, 1923, in their entirety be and they are hereby permanently suspended. That the same shall not become effective and existing rates shall remain in effect until the further order of the department.

Witness, the Department of Public Works of Washington this 24th day of October, 1923.

The Department of Public Works of Washington, by E. V. Kuykendall, Director. Frank R. Spinning, Supervisor of Transportation. E. V. Kuykendall, Director. Attest: Sam L. Crawford, Secretary."

Subscribed and sworn to before me this 27th day of October, 1923. R. E. Ostrander, Notary Public residing in Thurston County, Washington.

[File endorsement omitted.]

[fol. 145] In the District Court of the United States

[Title omitted]

Decree—Filed January 5, 1924

This cause having come on regularly for hearing in this court on the 31st day of December, 1923, upon the defendants' motion to dismiss the bill of complaint filed herein, plaintiff being represented by Messrs. Otto B. Rupp and W. V. Tanner, its solicitors, and the defendants being represented by John H. Dunbar, Attorney General of the State of Washington, and Raymond W. Clifford, his assistant, and Messrs. H. C. Brodie, Thomas J. L. Kennedy, E. K. Murray, J. M. Geraghty and Alex M. Winston, their solicitors, and after hearing the arguments of counsel for the respective parties, the court having announced its oral opinion and decision that the motion to dismiss should be sustained upon the grounds that the bill of complaint herein does not state any matters of equity entitling the [fol. 146] complainant to the relief prayed for; that said bill of complaint does not state facts sufficient to entitle complainant to any relief against the defendants; and that said bill has been prematurely brought, by reason of the failure to exhaust the right of plaintiff to relief in the Superior and Supreme Courts of the State of Washington:

Now, on this 5th day of January, 1924, the parties herein now appearing by their respective counsel, on motion of the defendants,

pursuant to such decision of the court, it is by the court hereby ordered, adjudged and decreed that said motion to dismiss be and it is hereby granted, and that said bill of complaint and this cause of action be, and the same hereby are, dismissed, and that the defendants have and recover their costs and disbursements herein.

To the foregoing, and each and every part thereof, the plaintiff excepts, and its exception is allowed.

Done in open court this 5th day of January, 1924.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 147] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS—Filed January 5, 1924

Comes now The Home Telephone and Telegraph Company of Spokane, a corporation, plaintiff in the above entitled cause, and files the following Assignment of Errors on which it will rely on its appeal from the decree entered in the above entitled cause on the 5th day of January, 1924.

I

The court erred in sustaining defendant's motion to dismiss the bill of complaint in the above entitled cause, upon the ground that said bill of complaint does not state any matters of equity entitling the plaintiff to the relief prayed for.

[fol. 148]

II

The court erred in sustaining defendants' motion to dismiss the bill of complaint in the above entitled cause, upon the ground that said bill of complaint does not state facts sufficient to entitle plaintiff to any relief against the above named defendants.

III

The court erred in sustaining defendants' motion to dismiss the bill of complaint, upon the ground that said bill was prematurely brought, by reason of plaintiff's failure to exhaust its right to relief in the Superior and Supreme Courts of the State of Washington.

IV

The court erred in making and entering the decree of January 5, 1924, dismissing the bill of complaint and the cause of action herein.

V

The court erred in refusing to hold that the order of the Department of Public Works of Washington, rendered March 31, 1923, deprives plaintiff of its property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

VI

The court erred in holding that the order of the Department of Public Works of Washington, rendered March 31, 1923, was not the final legislative act under the laws of the State of Washington.

[fol. 149]

VII

The court erred in holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is not, in so far as it purports to confer legislative power upon the courts of the State of Washington, in violation of and contrary to Article II, Section 1, and Article IV, Section 1, of the Constitution of the State of Washington.

VIII

The court erred in holding that the pendency of a certain cause in the Superior Court of the State of Washington for Thurston County, entitled: "The State of Washington ex rel. The City of Seattle, a municipal corporation, Petitioner and Relator, V. E. V. Kuykendall, as Director of Public Works, Hance H. Cleland, as Supervisor of Public Utilities, and Frank R. Spinning, as Supervisor of Transportation of the State of Washington, the persons constituting that portion of the Department of Public Works of Washington, exercising jurisdiction in the Division of Public Utilities under the 'Public Service Commission Law;' and The Pacific Telephone and Telegraph Company, a corporation, Respondents," requires that this suit pending in the United States District Court for the Western District of Washington, Southern Division, be stayed.

IX

The court erred in not holding that Chapter 182 of the Session Laws of the State of Washington for the year 1913 is contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, so far as said Chapter 182 precludes a determination of the value of the property of the above named plaintiff as of the time when an inquiry was made by the Department of Public Works of the State of Washington in 1923 regarding rates.

[fol. 150] Wherefore, in order that the foregoing Assignment of Errors may be and appear of record, plaintiff presents the same to the court and prays that such disposition may be made thereof as is

in accordance with the law and statutes of the United States in such cases made and provided; and plaintiff prays that said decree of January 5, 1924, be reversed, set aside and held for naught.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 151] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR ALLOWANCE OF APPEAL—Filed January 5, 1924

The above named, The Home Telephone and Telegraph Company of Spokane, feeling itself aggrieved by the decree rendered in the above entitled cause on the 5th day of January, 1924, dismissing the Bill of Complaint and cause of action in said cause, does hereby appeal from said decree to the Supreme Court of the United States, and prays that this, its appeal, may be allowed and that a transcript of the record and proceedings in said cause, and all things concerning the same, upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herein filed by said The Home Telephone and Telegraph [fol. 152] Company of Spokane, may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Petitioner. W. V. Tanner, Of Counsel.

[File endorsement omitted.]

[fol. 153] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 5, 1924

It is hereby ordered, that the appeal prayed for by the above named plaintiff in the above entitled cause, to the Supreme Court of the United States, be and the same hereby is allowed as prayed.

Done in open court this 5th day of January, 1924.

Edward E. Cushman, Judge.

[File endorsement omitted.]

[fol. 154] IN UNITED STATES DISTRICT COURT

ORDER FIXING AMOUNT OF BOND ON APPEAL—Filed January 5, 1924

On reading the petition of the above named plaintiff in the above entitled cause, for the allowance of an appeal to the Supreme Court of the United States from a decree rendered in said cause on January 5, 1924, dismissing the bill of complaint and cause of action in said cause, it is ordered that the plaintiff above named execute and file in the office of the Clerk of the above entitled court a bond on appeal conditioned according to law, in the sum of one thousand dollars with good and sufficient surety to be approved by the undersigned.

Done in open court this 5th day of January, 1924.

Edward E. Cushman, Judge.

[fols. 155 & 156] [Title omitted]

BOND ON APPEAL FOR $1,000—Approved and filed January 5, 1924; omitted in printing

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[fols. 157–159] CITATION IN USUAL FORM SHOWING SERVICE ON DUNBAR, CLIFFORD & BRODIE—Filed January 5, 1924; omitted in printing

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[fol. 160] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed January 26, 1924

To the Clerk of the above entitled court:

Please make and certify on appeal to the Supreme Court of the United States, a record which includes the following files, to-wit:

1. Bill of Complaint and Exhibits;

2. Subpœna and Marshal's return thereto;

3. Temporary Restraining Order;

4. Affidavits of C. T. Blanck, C. S. Cassassa, P. H. Coolidge, C. E. Fleager (3 thereof), Henry L. Gray, L. Lewis Rutter, J. C. Nowell, [fol. 161] W. J. Phillips, offered in evidence by plaintiff in support of its application for an interlocutory injunction;

5. Motion of defendants to dismiss plaintiff's complaint;

6. Motion of defendants to dissolve restraining order, together with affidavit thereto attached;

7. Affidavit of Alex M. Winston filed in opposition to application for interlocutory injunction;

8. Order of April 30, 1923, denying interlocutory injunction;

9. Opinion filed May 23, 1923, on application for interlocutory injunction;

10. Motion filed July 5, 1923, to compel defendants to answer;

11. Order of July 9, 1923, denying said motion;

12. Order of October 22, 1923, vacating order of July 9, 1923, and fixing hearing on motion to dismiss;

13. Affidavit of E. V. Kuykendall dated October 27, 1923, in support of defendants' motion to dismiss;

14. Decree of January 5, 1924;

15. Assignment of Errors;

16. Petition for Allowance of Appeal;

17. Order allowing Appeal;

18. Order Fixing Amount of Bond on Appeal;

19. Bond on Appeal;

20. Citation;

[fol. 162] 21. Acceptance of Service;

22. This Præcipe and acknowledgment of service attached thereto.

Otto B. Rupp, Post, Russell & Higgins, Pillsbury, Madison & Sutro, Solicitors for Plaintiff. W. V. Tanner, of Counsel.

Due, regular and timely service of the foregoing præcipe is hereby acknowledged this 23rd day of January, 1924.

John H. Bunbar, Attorney General; Raymond W. Clifford, Assistant Attorney General, Solicitors for Defendants.

[File endorsement omitted.]

[fol. 163] UNITED STATES OF AMERICA,
Western District of Washington, ss:

CLERK'S CERTIFICATE

I, F. M. Harshberger, Clerk of the District Court of the United States of America, for the Western District of Washington, do hereby certify and return to the claim of appeal of The Home Tele-

phone and Telegraph Company of Spokane from a certain Decree dated January 5, 1924, in a cause pending in said court wherein The Home Telephone and Telegraph Company of Spokane, a corporation, is plaintiff, and E. V. Kuykendall, as Director of Public Works of Washington, Hance H. Cleland, as Supervisor of Public Utilities of Washington, and Frank R. Spinning, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of Washington, and John H. Dunbar, Attorney General of the State of Washington, are defendants, that the above and foregoing and within transcript of record, pages numbered 1 to 165 inclusive, is a true copy of all papers filed and proceedings had and entered in said cause as the same appear on file and of record in my office; that I have compared the same with the originals, and they are true and correct transcripts therefrom and of the whole thereof.

I further certify that I hereto attach and herewith transmit the original citation in said cause with acceptance of service on said writ.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges as incurred and paid in my office by and on behalf of appellant herein, for making record, certificate and return to the Supreme Court of the United States in the above entitled cause, to-wit:

[fol. 164] Filing appeal papers, orders, etc., and issuing citation	$7.00
Clerk's Fees (Sec. 828 R. S. U. S.) for making record, certificate and return, 625 folios at 15¢	93.75
Certificate of Clerk to record, 4 folios at 15¢ and seal	.80
Total	$101.55

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Tacoma, in said District this 29th day of January, in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States the one hundred and forty-eighth.

F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, by Ed. M. Lakin, Deputy. (Seal of the United States District Court, Western District of Washington.)

[fols. 165 & 166] [Duplicate citation omitted.]

Endorsed on cover: File No. 30,100. W. Washington D. C. U. S. Term No. 790. The Home Telephone and Telegraph Company of Spokane, appellant, vs. E. V. Kuykendall, as Director of Public Works of Washington, et al., etc., et al. Filed February 4th, 1924. File No. 30,100.

FILED
MAR 24
WM. R. STA

Nos. 539 and 789.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant,*

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief and Argument of Appellant.

C. M. Bracelen,
W. V. Tanner,
Of Counsel.

Otto B. Rupp,
Frank T. Post,
H. D. Pillsbury,
Solicitors for Appellant.

Law Brief Printing Co., Seattle

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Nos. 539 and 789.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief of Appellant.

Statement.

This suit is a companion of a suit entitled "The Pacific Telephone and Telegraph Company, Appellant, v. E. V. Kuykendall, et al., Appellees, in which

appeals have also been taken to this court and are docketed as cases No. 540 and No. 790. The present appeals are docketed as cases No. 539 and 789.

There are involved in this case two appeals: one, from an order made on April 30, 1923, by Honorable William B. Gilbert, Circuit Judge, and Honorable Edward E. Cushman and Honorable Jeremiah Neterer, District Judges, sitting as a statutory court under section 266 of the Judicial Code, which order denied an application made by The Home Telephone and Telegraph Company of Spokane, appellant here, for an interlocutory injunction restraining the enforcement of a rate order made on March 31, 1923, by the Department of Public Works of Washington; the other, an appeal from a final decree signed by Judge Edward E. Cushman, District Judge, and entered on January 5, 1924, dismissing the complaint of the appellant company.

Inasmuch as the questions involved in these two appeals are substantially the same, it would seem that it would be but an added burden on the court to compel it to read a separate brief in each appeal. We shall, therefore, file but one brief.

A statement of the facts of the controversy follows:

The appellant (hereinafter referred to as the "company") is a corporation organized under the laws of the State of Washington. It is engaged in a general telephone and telegraph business in the City of Spokane and the territory immediately adjacent thereto. The rates it charges for telephone service are subject to regulation by the State of Washington.

On August 8, 1919, the Public Service Commission of that State, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service in the Spokane exchange. These rates remained in effect until September 20, 1922, when the company filed a schedule advancing its rates. The state law authorizes the department to suspend rate increases pending an investigation of their reasonableness. (Remington's Compiled Statutes, 1922, Section 10424.) On September 24, 1922, the department issued an order suspending for the full statutory period the operation of these increased rates.

On March 31, 1923, the department made an order—one member, the Supervisor of Public Utilities, dissenting—whereby the application of the

company for increased rates was denied. This order was preceded by a valuation finding made by the department which purported to determine the value of the used and useful property of the company. (Tr. pp. 17 to 24.) Parenthetically, it may be said that the rate order of March 31, 1923, was a joint one in that it prescribed rates for this company and for The Pacific Telephone and Telegraph Company.

The state law authorizes a judicial review of a rate order in the state courts, provided that proceedings for such review are initiated within thirty days after service of the order. (Rem. Comp. Stat., 1922, Sec. 10428.)

The company did not sue out a writ of review within thirty days, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923.

The company did, however, on April 24, 1923, file a complaint in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia*, the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of

this last mentioned schedule by the department and the making of the order by the department of March 31, 1923.

The company further alleged that the cost of its property in the Spokane exchange was $4,266,899; that said amount was substantially the rate base fixed by the department in its valuation finding of March 31, 1923; that the fair value of its property in the Spokane exchange was $5,710,684; that under the schedule of rates in effect during the year 1922, which schedule was continued in effect by the order of March 31, 1923, the company had earned in 1922 upon the cost of its property 3.07 per cent per annum; that upon the fair value of its property under such schedule it had earned in the same year 2.28 per cent per annum; that if the order of March 31, 1923, was enforced the company would be prevented from earning any return in excess of 1.88 per cent per annum upon the fair value of its property; that had the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair and reasonable rates, been in effect throughout the year 1923, the return to the company upon the fair value of its property would have been 5.52 per cent and

upon the cost of its property 7.64 per cent; that these rates were *less* than just and reasonable rates, but that the company proposed to establish and put into effect such rates pending the final decree in the case.

It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable until such time as just and reasonable rates and charges were established according to law. (Transcript, pp. 1 to 8.)

On the same date that the complaint was filed, the company applied to Judge Cushman for a temporary restraining order, which order was granted on that date. A copy of this order appears on page 72 of the printed transcript in case numbered 539 and on the same page in case numbered 789. We may here say that the printed transcript in case numbered 539 is identical with the printed transcript in case numbered 789 for the first 132 pages.

Subpoenas were issued on the same date the restraining order was granted, and served on the defendants named in the complaint, appellees here, on April 25, 1923. Jurisdiction of the United States District Court over the cause had, therefore, fully vested on April 25, 1923.

At this point it may be said that on April 27, 1923, the City of Seattle sued out a writ of review in the Superior Court of Thurston County, claiming that the rates for Seattle fixed by the department's order of March 31, 1923, were excessive. As The Home Telephone and Telegraph Company of Spokane, this appellant, does not operate in Seattle nor at any place other than the City of Spokane and the territory immediately adjacent thereto, it is obvious that the proceeding brought by the City of Seattle cannot, under any possible hypothesis, affect this case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30, 1923. At that time the department and the Attorney General filed two motions, one to dismiss the complaint, the other to dissolve the restraining order. (Transcript, p. 104.)

After argument was concluded on April 30th, the statutory court entered an order dissolving the restraining order, denying the interlocutory injunction, and stated that an opinion would be filed later. (Transcript, p. 119.)

The opinion was filed on May 23, 1923. That opinion treated the case brought by this company and the case brought by The Pacific Telephone and Telegraph Company as a consolidated cause.

The opinion states, in substance, that the proceeding instituted by the City of Seattle in the Thurston County court was not one brought to enforce the order of the department of March 31st, and therefore does not fall within the amendment to section 266 of the Judicial Code; that there was no need for the company to apply to the department for a rehearing of the rate order before it brought the suit in the United States District Court; that under the statutes of the State of Washington the courts of that State in reviewing a *rate* order, act in a *judicial* capacity because the state courts are given no power by the section of the statute relating to the review of a rate order to make their own findings or fix rates, and, consequently, so far as the rate order of March

31, 1923, was concerned, the suit in the United States District Court was not prematurely brought.

It states further, however, that the complaint filed in the United States District Court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington (Rem. Comp. Stat., 1922, Sec. 10441) the Superior Courts and Supreme Court of that State "have *legislative* authority in determining the rate base superior to that of the department," and that " 'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed." (Transcript, p. 131.)

The statutory court further held that if the company initiated a review proceeding in the state court and applied in that proceeding for a stay of the enforcement of the order of March 31st, and also applied for a stay in the proceeding brought by the City of Seattle in the Thurston County court, and such applications for stay were denied by the Superior Courts of the State of Washington and such denials affirmed by the state Supreme Court,

then the company might renew its application in the United States Court for an interlocutory injunction. (Transcript, p. 132.)

It is at once apparent that the statutory court considered that the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, was controlling.

An appeal was taken by the company from the order of the statutory court denying the interlocutory injunction, and the same was docketed in this court as cause No. 539.

On July 5, 1923, the company filed a motion in the United States District Court for the Western District of Washington, Southern Division, for an order requiring the defendants named in the complaint, appellees here, to file forthwith, an answer to the complaint, or in default thereof that a decree *pro confesso* be entered against said defendants.

As hereinbefore stated, the appellees had on April 30, 1923, filed, among other motions, a motion to dismiss the complaint, on the ground that there was a want of equity in the complaint. No argument had ever been had up to that time on the motion to dismiss.

On July 9, 1923, after argument, the District Judge declined to consider or pass upon the motion

to dismiss the complaint, and denied the motion to require the appellees to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion rendered by the statutory court and filed on May 23, 1923.

On August 2, 1923, The Pacific Telephone and Telegraph Company sued out in the Circuit Court of Appeals for the Ninth Circuit a rule to show cause why the District Court should not proceed in the case brought by the Pacific Company. That case was heard by the Circuit Court of Appeals on September 18, 1923. On October 7, 1923, the case was decided by the Circuit Court of Appeals in favor of the Pacific Company, and a writ of mandamus was issued by that court commanding the District Court to proceed forthwith in the suit brought by the Pacific Company. (The opinion of the Circuit Court is reported in 292 Federal, at page 930.)

In view of the fact that the defendants in the suit brought by the Pacific Company and the defendants in the suit brought by this company were the same, that the ruling and order made by the District Judge in the case brought by the Pacific Company and the ruling and order made by the District Judge in this case are identical except for

the names of the plaintiffs, and that the issues involved in the two suits were the same, it was not deemed necessary that this company should make an application for a writ of mandamus.

The District Court, upon receipt of the mandate, vacated the order of July 9, 1923, made in this case and assigned October 29, 1923, as the date for argument on the motion to dismiss the complaint.

For various reasons not necessary now to mention, argument on the motion to dismiss was not had until December 31, 1923. On that date, after argument, the District Judge, Honorable Edward E. Cushman, granted the motion to dismiss the complaint of the company on the ground, primarily, that the suit had been prematurely brought by reason of the failure of the company to exhaust its alleged right to relief in the Superior Courts and Supreme Court of the State of Washington.

A formal decree dismissing the complaint was signed by the District Judge and filed on January 5, 1924. Thereupon, an appeal was taken from that decree to this court and is docketed herein as cause No. 789.

Assignment of Errors.

There is some slight difference between the Assignment of Errors in case No. 539 and case No. 789, but the difference arises solely from the character of the action complained of. For convenience sake, however, all Assignment of Errors in both appeals may be summarized and grouped as follows:

I.

The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

II.

Legislative power cannot constitutionally be vested in Washington state courts.

III.

The Washington state law expressly forbids a stay.

IV.

Wholly apart from constitutional questions, the legislative process in this case was complete prior

to the filing of the complaint in the United States Court.

V.

The complaint states a cause of action for injunctive relief.

Argument.

It is apparent that both the statutory court and the District Judge thought that this case was controlled by the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

It was held in that case that where the reduced rates had not taken effect and probably would not take effect until the Supreme Court of Appeals of Virginia could, on appeal from the order of the Virginia Commission, perform the legislative function, constitutionally vested in the court, of finally fixing rates "considerations of comity and convenience" required that the railroad companies should delay their application for relief to the United States courts until the legislative issues raised by the appeals were denied, or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed rates would be put into operation.

In that case legislative power has been imposed by the Constitution of Virginia upon its state courts, and the order of the regulatory body was therefore not the final legislative act.

Again, in that case the property of the railroad company had not, at the time of the application to the United States court, been confiscated and its property would be confiscated only in the event that the reduced rates were finally put into operation. That case is not applicable to the facts in the case at bar for several reasons:

1. The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

2. Legislative power cannot constitutionally be vested in the Washington state courts.

3. The Washington state law expressly forbids a stay.

4. Wholly apart from constitutional questions, the legislative process in this case was complete prior to the filing of the complaint in the United States court.

I.

THE JUDICIAL STAGE IS REACHED WHENEVER JUDICIAL INTERVENTION IS NECESSARY TO OBTAIN RELIEF FROM CONFISCATORY RATES ORDERED BY A REGULATORY BODY.

The *Prentis* case is based upon "considerations of comity and convenience." In that case there had been no present invasion upon the rights of the railroad companies. They had not lost a single dollar. In the case at bar, however, the company is now and has been suffering daily from confiscation under the rate to which it is now limited. Its constitutional rights have been invaded. "Rules of comity and convenience must give way to constitutional rights."

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of that State which was the last legislative tribunal. This court held, however, that inasmuch as the utility was suffering daily from confiscation under the rate to which it was limited, the

statutory court should have heard the application for an interlocutory injunction upon the merits.

In support of this conclusion, this court cites *Love v. Atchison, Topeka & Santa Fe Ry. Co.*, 185 Fed. 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case, page 327:

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby without just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a

state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The same question was again before this court in *Prendergast v. New York Telephone Co.*, 262 U. S. 43, where this court followed and cited with approval *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, and *Love v. Atchison, Topeka & Santa Fe Ry. C.*, 185 Fed. 321, and concluded as follows: "Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined *pending the continuance and completion of the rate making process.*" (Italics ours.)

We say again that there has been a present invasion of our constitutional rights, and that judicial intervention is necessary to obtain relief from such invasion. If judicial intervention is necessary to obtain relief, it is clear that the judicial stage is reached.

Where a utility is daily suffering confiscation it is not necessary that the legislative process be complete before a resort is had to the United States Courts.

The only distinction ever sought to be drawn by appellees between the case at bar and the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is that in the Oklahoma case an application was made to the Supreme Court of that State for a stay and such application denied. In fact, however, no such distinction exists, because, as we shall show later, the law of the State of Washington expressly forbids the courts of that State from granting a stay.

II.

LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN WASHINGTON STATE COURTS.

The statutory court in denying the interlocutory injunction and the District Court in dismissing the complaint did not hold that the state courts possessed legislative power in respect to the rate order of the department. The statutory court and the District Court based their action solely upon the fact that section 10441 of Rem. Comp. Stat., 1922, of Washington, imposes upon the state courts of Washington the *legislative* authority of determining the value of the property of public service companies operating in that state.

An examination of the Washington law is necessary. In the case of an order affecting *rates*, the statute provides for a *judicial* review of such order by the state courts. This is clear from the provisions of section 10428 of Rem. Comp. Stat. of Washington, 1922. That section provides that any complainant or public service company affected by a rate order may, within thirty days after the making of the order, sue out a writ of review in one of the superior courts of the State of Washington. It further provides for a hearing before such court and that "upon such hearing the superior court shall render judgment either affirming or setting aside the order of the commission under review."

Similar provisions are found in the regulatory acts of a majority of the states.

But an entirely different situation is presented when the provisions of the Washington statute relative to the determination of value are considered.

Section 10441 of Rem. Comp. Stat., 1922, directs the regulatory body to ascertain, as early as practicable, the value of every public service company subject to its jurisdiction. It then provides for a hearing at which the utility affected may be heard,

and for the making of findings of fact by the regulatory body, which findings shall cover in detail all matters which the legislature deemed material to the determination of value.

This valuation proceeding is independent of rate controversies.

The statute further provides that the utility, and the utility alone, may institute a suit in one of the superior courts of the State of Washington for the purpose of having the findings of the regulatory body reviewed, and that in case the Superior Court to which appeal has been made

"finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful, or not supported by the evidence [the court] *shall make new and correct findings* to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

The statute also provides that an appeal may be taken from the judgment of the Superior Court to the Supreme Court, and that

"in case the supreme court finds any findings so

sought to be reviewed unjust, incorrect, unlawful, or unreasonable, or not supported by the evidence, *it shall either make and render proper findings* or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

Further,

"the findings . . . . . shall be admissible in evidence in any action, proceeding or hearing . . . . . and such findings, when so introduced, shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing . . . . ."

(For the convenience of the court we set out in full sections 10428 and 10441 as an appendix to this brief.)

Now we concede that the review provided for in section 10441 is not a judicial review, and that this section is similar to paragraphs 6, 7 and 8 and the first sentence of paragraph 64 of the Public Utilities Act of the District of Columbia, and which sections of said Act were considered by this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428.

It was held in that case, among other things, that the act of Congress attempted to confer upon this court the power to make the order the Commission should have made, and that such power was legislative power.

In the case at bar it is clear that the legislature of the State of Washington has attempted to confer a like power upon the courts of that State.

But the question here for solution is, Could the legislature, under the Constitution of that State, vest legislative power in the courts?

There is no provision in the Constitution of the State of Washington similar or analogous to the provision in the Constitution of Virginia discussed in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

On the contrary, the provisions of the Constitution of the State of Washington relative to the vesting of powers are almost identical with the provisions in that regard of the Constitution of the United States.

In the absence, therefore, of some declaration to the contrary by the Supreme Court of the State of Washington, the decision of this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428, is controlling.

The doctrine therein announced is supported by an almost unbroken line of authority starting at the very beginning of this Republic and extending to the present date. In confirmation of this statement, we cite the following cases:

Hayburn's Case, 2 Dall. 409, and note at p. 410;

The Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930;

Kilbourn v. Thompson, 103 U. S. 168, 190;

United States v. Ferreira, 13 How. 40, and note;

Helena Water Co. v. City of Helena, 277 Fed. 66, 68;

Oregon R. & Navigation Co. v. Campbell, et al, 173 Fed. 957;

Western Union Tel. Co. v. Myatt, 98 Fed. 335;

Ex parte Riebeling, 70 Fed. 310;

State ex rel. Godard v. Johnson, 61 Kan. 803;

In re Sims, 54 Kan. 1;

State ex rel. Taylor v. Missouri-Pacific R. R. Co., 76 Kan. 467;

Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500;

Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 508;

City of Zanesville v. Telephone Co., 63 Ohio St. 442;

State ex rel. Montgomery v. Rogers, 71 Ohio St. 203;

Thompson v. Redington, 92 Ohio St. 101;

DeChastellux v. Fairchild, 3 Harris 18;

Buck's County Prison Board, 28 Pa. Co. Ct. 65,70;

Glaspell v. City of Jamestown, 11 N. D. 86;

Steenerson v. Great Northern Ry. Co., 69 Minn. 353;

State v. Great Northern Ry. Co., 130 Minn. 57;

State ex rel. Young v. Brill, 100 Minn. 499;

State ex rel. White v. Barker, 116 Iowa 96;

Norwalk St. Ry. Company's Appeal, 69 Conn. 576;

Nebraska Telephone Co. v. State, 55 Neb. 627;

Tyson v. Washington County, 78 Neb. 211;

State Racing Commission v. Latona Agricultural Assn., 136 Ky. 173;

City of Boston v. City of Chelsea, 212 Mass. 127;

Case of Supervisors of Election, 114 Mass. 247;

Butler v. State, 97 Ind. 373;

Ex parte Griffiths, 118 Ind. 83;

United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571;

In re County Commissioners, 22 Okla. 435;

Board of Supervisors v. Todd, 97 Md. 247;

Taylor & Co. v. Place, 4 R. I. 324, 345, 357, 358;

Bates v. Kimball, 2 D. Chip. (Vt.) 77;

Kimball v. Grantsville City, 19 Utah 368;

Houseman v. Kent, 58 Mich. 364;

Merrill v. Sherburne, 1 N. H. 199, 204.

But we are not without clear decisions of the Supreme Court of the State of Washington holding that the legislature cannot impose legislative functions upon the courts of that State.

In *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110, the court said:

"We hold that a *judicial* court *cannot* exercise legislative functions and that the *legislature cannot impose such power upon it.*"

In *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500, the court said:

"Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts

to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*" (Italics ours.)

We quote from *In re Bruen*, 102 Wash. 472, at page 478:

"These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully *separated* and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

Spokane v. Spokane and Inland Empire R. Co., 75 Wash. 651; 659;

Selde v. Lincoln County, 25 Wash. 198, 206;

Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.

Since, as we have shown, legislative power cannot constitutionally be conferred upon the state courts of Washington, it is obvious that the legislative process terminated upon the making of the rate order of March 31, 1923.

III.

THE WASHINGTON STATE LAW FORBIDS A STAY.

It will undoubtedly be claimed that the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is not applicable because of the failure of the company to seek a stay of the rate order in the Washington state courts. But that case is not so distinguishable. As already stated, it would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31, 1923, because the state courts are expressly prohibited by statute from staying the enforcement of that order.

Section 10424, Rem. Comp. Stat., 1922, relating to the filing of tariffs increasing rates and providing for a hearing on such proposed increase and

the suspension of the schedule pending the hearing, declares that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is not open to question that this provision is plain, direct, positive and unambiguous.

Moreover, the granting of a stay is expressly prohibited by another provision of the Washington law. The rates approved by the department in its order of March 31, 1923, had been put in effect originally on August 1, 1919. The rates, therefore, on March 31, 1923, had been in effect *for more than one year.* On October 5, 1922, the company filed a schedule advancing the rates for telephone service in the cities of Seattle and Tacoma, and toll rates throughout the State. Section 10429, Rem. Comp. Stat., 1922, provides that:

"when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed

in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

It is manifest, therefore, that even though the company had instituted review proceedings in the Superior Court of Thurston County and had applied in that proceeding and also in the proceeding brought by the City of Seattle in the Thurston County court for a stay, neither that court nor the state Supreme Court could have granted any relief to the company until after the final decision of the case upon its merits by the Supreme Court.

We again say that we have never been able to conceive of any theory by which this company, which operates in Spokane only, could apply in the suit brought by the City of Seattle in the Thurston County court, which suit relates solely to the rates charged in Seattle, for a stay or relief of any kind.

Since any application to the state court for a stay would not only have been futile, but also one which the company had not the legal right to make, the company should not have been required to make it as a condition precedent to its resort to the United States Court.

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is, therefore, not distinguishable from the case at bar, and the following language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is apposite:

"Again, if the petitioner was denied a supersedeas by the state or by the state courts, the rule announced in the Oklahoma Gas Co. Case applies, and in this connection it is immaterial whether the supersedeas was denied by the court or by the supreme legislative authority of the state."

As indicated in the opinion of the Circuit Court of Appeals in the case of *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, appellees have heretofore sought to escape the plain provisions of sections 10424 and 10429, Rem. Comp. Stat., 1922, by asserting (a) that such provisions are unconstitutional, and (b) that the state courts of Washington have inherent power to grant a stay. These contentions merit but little consideration.

No reason has ever been assigned why the statutes in question should be held to be unconstitutional. We can conceive of no reason why the statutes should be held invalid. Moreover, how can the question as to whether the statutes are valid

or not arise? We believe that the statutes absolutely deprive the state courts of the power to grant a stay, and that the statutes are valid. On what theory then can we ask the state courts for a stay? Are we to go into a court of justice and ask the court to grant to us a relief which we firmly believe the court has not the power to give?

With reference to the argument that the state courts have inherent power to grant a stay despite the express and positive provisions of the statutes to the contrary, we say that the state courts acting in a *legislative* capacity have no such power. Hence, if the state courts do have inherent power to grant such a stay, they have it wholly in the exercise of their general judicial power. But we may not safely apply to the state courts acting in a purely judicial capacity for relief. (*Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission*, 235 U. S. 402.)

Moreover, appellees cannot assert that the state courts could in this case act in a judicial capacity, for the entire basis of their defense is that the court is acting in a legislative capacity.

Again the language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is pertinent.

"But it has been mildly suggested that this provision of the law may be declared unconstitutional by the Supreme Court of the state, or that the courts of the state might grant a supersedeas, notwithstanding the prohibition contained in the statute. We are not permitted to indulge in any such speculation where important constitutional rights are involved. No ground of unconstitutionality has been suggested; the presumption is to the contrary, and in this case we think the presumption accords with the fact. In the exercise of appellate jurisdiction conferred by the Constitution, it may be that the Supreme Court of the state has inherent power to grant a supersedeas to the end that its appellate jurisdiction may not be defeated; but however that may be, where, as here, the appeal is wholly statutory, jurisdiction may be conferred or withheld at the pleasure of the Legislature."

IV.

WHOLLY APART FROM CONSTITUTIONAL QUESTIONS, THE LEGISLATIVE PROCESS IN THIS CASE WAS COMPLETE PRIOR TO THE FILING OF THE COMPLAINT IN THE UNITED STATES COURT.

(1) As already stated, section 10441 Rem. Comp. Stat., 1922, provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed

and corrected by the courts, and as made or corrected "when properly certified under the seal of the commission" are "admissible in evidence in any action, proceeding or hearing," and are "conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing."

But if we assume, for the sake of the argument only, (a) that legislative power may be imposed upon courts in the State of Washington, and (b) that the valuation findings are now subject to review in the state courts, nevertheless a review of such findings at this time would not affect the rate order of March 31, 1923, which became final, so far as resort to the state courts was concerned, by the failure to review that order within the thirty day period provided by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts *by the failure of the utility to invoke the action of the final state legislative authority* under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative

authority of the State, namely, the Supreme Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals, "if the companies see fit to take them," and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees."

In the case now before the court, the company did not within thirty days sue out, nor has it ever sued out a writ to review the order of March 31, 1923. The time within which such proceedings might have been begun expired on April 30, 1923, the day on which the application for an interlocutory injunction was argued. It is manifest that under the provisions of the state law, the company cannot now institute any proceeding in the state court by which it might obtain relief.

Conceding, therefore, for the moment that in respect to valuation findings the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the

judicial stage within the rule announced in the *Prentis* case.

(2) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington, nevertheless in deciding whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry." (*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227.)

If a regulatory body is empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, is legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body which authority the courts of the State of Washington clearly do not have.

In the case at bar, the order of March 31st establishes certain rates. If that order was reviewed in the state courts, those courts could not fix a new rate. The sole act which that court could perform would necessarily be judicial. The judicial stage, therefore, having been reached resort might be had to the United States court.

V.

THE COMPLAINT STATES A CAUSE OF ACTION FOR INJUNCTIVE RELIEF.

Some contention was made at the time of the argument on the motion to dismiss that the complaint in this case did not state a cause of action because its averments were averments of conclusions of law rather than averments of fact. A comparison of the allegations of this complaint with the allegations contained in the complaint in the case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, will show that if the averments in this complaint are averments of conclusions of law, the same is equally true of the averments in the complaint in the *Prendergast* case.

This court, however, said of the allegations in the complaint in the *Prendergast* case, that the

complaint "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence."

Conclusion.

It is pointed out in our brief opposing the motion to dismiss the appeal from the order of the statutory court denying an interlocutory injunction, that if that particular appeal is dismissed the question of whether or not the statutory court should have considered our application for an interlocutory injunction on the merits should be considered on this appeal.

In any event, all we seek by these appeals is an opportunity to have the case considered on its merits. So far we have been denied that opportunity, and the denial has been based upon the ground that the legislative process of determining the value of our property is not complete, and that there is a possibility that the state courts of Washington, if applied to, will stay the enforcement of the rate order which deprives us of our property. But the answer to these assertions of fact and possibility is clear and complete. It is not necessary

for a utility which is daily suffering confiscation to await the termination of the legislative process of rate making, much less that of the process of determining value, before it may invoke the aid and power of a United States court. Again, the legislative process was at an end on March 31, 1923, because (a) the statute which attempts to impose a legislative duty upon the state courts of Washington is absolutely void, and (b) the rate order of March 31, 1923, which deprives us of our property, has never been reviewed and cannot now be reviewed in the state courts. Moreover, even if that order could now be reviewed its enforcement could not, by virtue of positive and express provisions of the statutes of the State of Washington, be stayed by the courts of that state.

We, therefore, respectfully submit that the order of the statutory court entered on April 30, 1923, and the decree of dismissal signed on January 5, 1924, by the District Judge are erroneous and should be reversed.

Respectfully submitted,

OTTO B. RUPP,
FRANK T. POST,
H. D. PILLSBURY,
Solicitors for Appellant.

C. M. BRACELEN,
W. V. TANNER,
Of Counsel.

Appendix.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under

review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

SECTION 10441 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Valuation of Property—Procedure.

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business, and the sum required to meet fixed charges and operating

expenses on intrastate business, and the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, the relative proportion of the revenue which should be derived therefrom.

It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase or diminish.

It shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic and business of common carriers.

It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

The commission is hereby authorized to cause a hearing or hearings to be held at such time or times

and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the State of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act

or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience

of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing.

FILED
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WM. R. STANS
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Nos. 539 and 789.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

v.

E. V. KUYKENDALL, as Director of Public Works of Washington; HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND DISMISSING THE BILL.

Brief and Argument of Alex M. Winston of Counsel for Appellees.

ALEX M. WINSTON,
Of Counsel.

JOHN H. DUNBAR,
Attorney General of Washington,
Solicitor for Appellees.

SHAW & BORDEN CO. 208269

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There is no confiscation herein because the rates complained of are in accordance with a contract between appellant and the City of Spokane

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No. 539

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THE HOME TELEPHONE AND TELEGRAPH COMPANY OF SPOKANE, a corporation, *Appellant*,

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E. V. KUYKENDALL, as Director of Public Works of Washington; HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEAL FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND DISCUSSING THE BILL.

Brief and Argument of Alex M. Winston of Counsel for Appellees.

Foreword.

This brief does not deal with the question as to whether the statutory court was correct in the reasons given by it for denying an interlocutory injunction. It

is based solely upon the assumption that the appellant is bound by the terms of a franchise contract now existing between it and the City of Spokane for the furnishing of telephone service.

Statement of the Case.

At the time of the hearing upon the application of appellant for an interlocutory injunction, there was filed an affidavit of Alex M. Winston to the effect that appellant is operating under a franchise granted to it by the City of Spokane, and accepted by it, under the terms of which it contracts to furnish business telephones at a charge not to exceed $8.00 per month, and residence telephones at a charge not to exceed $2.00 per month. The affidavit further stated that the franchise ordinance had been adjudicated by the Supreme Court of the State of Washington to constitute a valid contract between the appellant and the City of Spokane and its inhabitants, save as it might be terminated by the Public Service Commission of Washington, the predecessor in duties of the Department of Public Works of Washington; and that the said contract has never been terminated by it, save by an order permitting the putting into effect of certain rates specified in exhibit "A" attached to the bill of complaint. The rates therein referred to were $7.50 per month for business telephones, wall sets, and $7.75 per month for business telephones, desk sets, and were $3.25 per month for residence telephones, wall sets, and

$3.50 per month for residence telephones, desk sets. (Transcript Tr. No. 539 p. 8).

The appellant filed an affidavit of C. E. Flaeger in reply to the affidavit of Alex M. Winston, but the allegations of Mr. Winston's affidavit hereinbefore set forth were not denied.

The bill of complaint herein seeks to enjoin the appellees from preventing appellant putting into force rates in Spokane lower than the following:

Business Telephones per month:

Wall Sets	$8.50
Desk Sets	8.75

Residence Telephones per month:

Wall Sets	3.75
Desk Sets	4.00

(Transcript Tr. No. 539 p. 69).

Appellees' Contention Herein.

A contract exists between appellant and the City of Spokane for the furnishing of telephone service at the rates complained of.

Argument.

It will be seen that appellant's position in this cause is that the rates permitted to be charged by the Depart-

ment of Public Works and its predecessor, though in excess of those contracted for in the franchise, are confiscatory; and appellant seeks to still further increase these charges without the consent of the Department.

This action is based solely upon the theory that the existing rates are confiscatory and within the prohibition of the constitution. It is manifest that unless there be confiscatory legislation the lower court had no jurisdiction, and that the application for an interlocutory injunction was rightfully denied. This calls for the determination of the question of whether there is now in existence a legal franchise contract between the appellant and the City of Spokane.

We are well aware of the rule laid down by this court in *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290-293, that this court will not ordinarily pass upon questions that should have been passed upon by the lower court. Therefore, if it were a question of passing upon the conflicting affidavits that were before the lower court as to the merits of the bill in relation to valuation, earnings, and the like, this brief would not have been written. The rule in question, however, is not one of universal application in every instance. In fact, in the *Russell* case this court said "generally it is not desirable that we should pass upon such matters until they have been dealt with below." In the case at bar, however, the question herein presented by us goes to the question of jurisdiction. If this court should agree with us in our conten-

tion, this case, of necessity, is at an end. Such decision would prevent any further litigation and remit the appellant to such remedy as it may have been before the Department of Public Works of the State of Washington, and the courts of that state. If we are not right in our contention that the original franchise contract is valid and still in effect, save as modified by the order of the Department of Public Works, then this court will so hold, it being immaterial whether the decision of the lower court, upon the grounds set forth in it, was right or wrong. *McCluny v. Silliman*, 6 *Wheat.* 598. *Pennsylvania Ry. Co. v. Wabash, etc., Co.*, 157 *U. S.* 225.

It has been adjudicated that the rate provisions of the ordinance under which appellant is operating in the City of Spokane constituted a valid contract, save as they might be modified by order of the predecessor of the Department. *State ex rel Ellertsen v. Home Telephone and Telegraph Co.*, 102 *Wash.* 196.

If, therefore, the contract is in existence, save as modified by the Department of Public Works, there is no confiscation. *Columbus Railway Power & Light Co. v. City of Columbus, Ohio*, 249 *U. S.* 399.

It will be observed that in the Ellertsen case the Supreme Court of Washington, after holding that the rate provision of the franchise ordinance in question was valid, next proceeded to determine the effect of section 43 of the Public Service Commission Laws of the State

of Washington, Laws of 1911, page 567, which is as follows:

"Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules or rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company *as and when* directed by such order." (Italics of course ours).

Our contention is that the proper construction of this statute is that when the Commission permitted the appellant to depart from its contract with the City of Spokane, it simply modified the contract and that, as modified, it is still in full force and effect. In any event, we contend that if, as is held in the *Ellertsen* case, the state, acting under its superior authority, may set aside or modify the rate provisions of the franchise contract, there would be written into the contract, as a matter of law, the right of the state to modify it.

The Public Service Commission Law of the State of Washington vests the primary power to fix rates to be charged by public utilities in the Department of Public Works. From its orders parties deeming themselves ag-

grieved may have recourse to the courts. The material provisions of the law are set forth in an appendix to this brief, and the substance of them are as follows:

Section 10372 of Remington's Compiled Statutes of Washington provides for the filing by every telephone company with the Commission, and keeping open to public inspection, schedules showing its rates. Section 10373 of the same code provides that no change shall be made by any telephone company in any rate so published and filed, except after notice to the department and publication of the proposed new schedule. Section 10376 of the same code prohibits the departure by a telephone company from the rates so filed and published. Section 10379 of the code, being the section in controversy herein, has been set forth in this brief. Section 10422 of the same code provides for the making of complaints against unreasonable rates. Section 10423 of the same code provides for the hearing upon such complaint and the making of an order thereon. Section 10426 of the same code provides that when the Department finds that any rate is sufficient it may order that the rate be not changed, and further provides that such rate shall not be changed without the consent of the Department. Section 10428 of the same code provides for a review in the courts of any order of the Department.

It is a cardinal principal of statutory construction that the courts will, if possible, give effect to every word in a statute. *Lawrence v. Allen, 7 How.*, 785; *Bend v. Hoyt,*

13 *Peters*, 263; *Montclair Twp. v. Ramsdell*, 107 *U. S.* 147, and that a single word in the statute having a meaning must not be disregarded. *Post Master General of the U. S. v. Early*, 12 *Wheat*, 136. How, then, should the statute be construed? It is evident that when the Commission acted and directed the appellant to deviate from the schedule prescribed in its franchise contract, the contract either became at an end or it continued in existence, save as modified by the order of the Commission. What did the law makers of the State of Washington intend? If they intended that the contract should be terminated for all purposes for all time, then the words "as and when" need not have been inserted in the act. The act would have simply provided that the contract should be terminated "when" directed by the Commission. In other words, such a construction gives no effect to the word "as". It becomes superfluous, and must be disregarded, which this court says can not be done. It seems, therefore, to us that by the use of the term "as and when" it was the intention of the Washington legislature to say that the existing contract should be terminated in the manner and when directed by the Commission. So we see that the termination of the contract was by the substitution of the rates by the Commission directed to be thereafter charged by the utility.

A unique situation is presented in this case. It is not the ordinary case where a state, or one of its municipal subdivisions, attempts to impose, by force, confiscatory rates upon a utility. It is a case where a utility and a

community have agreed that, in consideration of the granting by the community to the utility, of a franchise, asked for and accepted by the utility, the utility is to furnish service at not to exceed certain rates specified in the franchise. The complaint of the utility in this case, in brief, is that the Department has not proceeded as far in removing alleged burdensome franchise obligations from the utility, as, in the judgment of the utility, it should have done. The utility in this case sought the aid of the Department's predecessor to relieve it from what, in late years, have proven to be alleged burdensome provisions of its contract. Had the Commission declined to act, the utility was helpless. The utility in one breath calls upon the state for relief, and in the next, by the bringing of the present action, accuses it of confiscation. We do not believe that the constitutional provision applies to cases like this.

If we be wrong in the foregoing premise, the appellant is in no better case. The contract in question being valid, and being subject to modification by the action of the Department, the parties thereto must be presumed to have contracted in reference to the power of the state to modify the contract. That being so, the contract must still remain in existence, the utility being a party on the one hand and the state a party on the other. So that, under the spirit, and we say the letter, of the law in question, properly construed, it follows that if the contract does not now exist between the original parties, save as modified, it does now exist between the utility on

the one hand and the State, on behalf of the citizens of Spokane, on the other. This action, therefore, can not be maintained.

For the reasons given, we believe that the order appealed from should be affirmed.

Respectfully submitted,

JOHN H. DUNBAR,
Attorney General of Washington,
Solicitor for Appellees,

ALEX M. WINSTON,
Of Counsel for Appellees.

Appendix.

SECTION 10372 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Tariff Schedule—Publication

Every telephone and telegraph company shall file with the commission and shall print and keep open to public inspection at such points as the commission may designate, schedules showing the rates, tolls, rentals, contracts and charges of such companies for messages, conversations and services rendered and equipment and facilities supplied for messages and services to be performed within the state between each point upon its line and all other points thereon, and between each point upon its line and all points upon every other similar line operated or controlled by it, and between each point on its line or upon any line leased, operated or controlled by it and all points upon the line of any other similar company, whenever a through service and joint rate shall have been established or ordered between any two such points. If no joint rate covering a through service has been established, the several companies in such through service shall file, print and keep open to public inspection as aforesaid the separately established rates, tolls, rentals, contracts and charges applicable for such through service. The schedules printed as aforesaid shall plainly state the places between which telephone or telegraph service, or both, will be rendered, and shall also state separately all

charges and all privileges or facilities granted or allowed, and any rules or regulations or forms of contract which may in any wise change, affect or determine any of the aggregate of the rates, tolls, rentals or charges for the service rendered. A schedule shall be plainly printed in large type, and a copy thereof shall be kept by every telephone company and telegraph company readily accessible to and for convenient inspection by the public at such places as may be designated by the commission, which schedule shall state the rates charged from such station to every other station on such company's line, or on any line controlled and used by it within the state. All or any of such schedules kept as aforesaid shall be immediately produced by such telephone company or telegraph company upon the demand of any person. A notice printed in bold type, and stating that such schedules are on file and open to inspection by any person, the places where the same are kept, and that the agent will assist such person to determine from such schedules any rate, toll, rental, rule or regulation which is in force shall be kept posted by every telephone company and telegraph company in a conspicuous place in every station or office of such company.

SECTION 10373 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Changes in Schedules.

Unless the commission otherwise orders, no change shall be made in any rate, toll, rental, contract or charge, which shall have been filed and published by any telephone or telegraph company in compliance with the requirements of the preceding section, except after thirty days' notice to the commission and publication for thirty days as required in the case of original schedules in the preceding section, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, toll, contract or charge will go into effect, and all proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. The commission for good cause shown may allow changes in rates, charges, tolls, rentals or contracts without requiring the thirty days' notice and publication herein provided for, by an order specifying the change so to be made and the time when it shall take effect, and the manner in which the same shall be filed and published. When any change is made in any rate, toll, contract, rental or charge, the effect of which is to increase any rate, toll, rental or charge then existing, attention shall be directed on the copy filed with the commission to such increase by some character immediately preceding or

following the item in such schedule, which character shall be in such form as the commission may designate.

SECTION 10376 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Schedule Rate to be Charged—Exceptions.

No telephone or telegraph company shall charge, demand, collect or receive different compensation for any service rendered or to be rendered than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person or corporation any form of contract or agreement or any rule or regulation or any privilege or facility except such as are specified in its schedule filed and in effect at the time, and regularly and uniformly extended to all persons and corporations under like circumstances for like or substantially similar service.

No telephone company or telegraph company subject to the provisions of this act shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state, except to its officers, employees, agents, pensioners, surgeons, physicians, attorneys at law, and their families and persons and corporations exclusively engaged in charitable and eleemosynary work, and ministers of

religion, Young Men's Christian Associations, Young Women's Christian Associations; to indigent and destitute persons, and to officers and employees of other telephone companies, telegraph companies, railroad companies and street railroad companies.

SECTION 10379 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Existing Contracts—Effect.

Nothing in this act shall be construed to prevent any telegraph company or telephone company from continuing to furnish the use of its line, equipment or service under any contract or contracts in force at the date this act takes effect or upon the taking effect of any schedule or schedules of rates subsequently filed with the commission, as herein provided, at the rates fixed in such contract or contracts: Provided, however, that the commission shall have power, in its discretion, to direct by order that such contract or contracts shall be terminated by the telephone company or telegraph company party thereto, and thereupon such contract or contracts shall be terminated by such telephone company or telegraph company as and when directed by such order.

SECTION 10422 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Complaints.

Complaint may be made by the commission of its own motion or by any person or corporation, chamber of

commerce, board of trade, or any commercial, mercantile, agricultural or manufacturing society, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public service corporation in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission: Provided, that no complaint shall be entertained by the commission except upon its own motion, as to the reasonableness of the schedule of the rates or charges of any gas company, electrical company, water company, or telephone company, unless the same be signed by the mayor, council or commission of the city or town in which the company complained of is engaged in business, or not less than twenty-five consumers or purchasers of such gas, electricity, water or telephone service: Provided, further, that when two or more public service corporations, (meaning to exclude municipal and other public corporations) are engaged in competition in any locality or localities in the state, either may make complaint against the other or others that the rates, charges, rules, regulations or practices of such other or others with or in respect to which the complainant is in competition, are unreasonable, unremunerative, discriminatory, illegal, unfair or intending or tending to oppress the complainant, to stifle competition, or to create or encourage the creation of monopoly, and upon such complaint or upon complaint of the commission upon its own motion, the commission

shall have power, after notice and hearing as in other cases, to, by its order, subject to appeal as in other cases, correct the abuse complained of by establishing such uniform rates, charges, rules, regulations or practices in lieu of those complained of, to be observed by all of such competing public service corporations in the locality or localities specified as shall be found reasonable, remunerative, nondiscriminatory, legal, and fair or tending to prevent oppression or monopoly or to encourage competition, and upon any such hearing it shall be proper for the commission to take into consideration the rates, charges, rules, regulations and practices of the public service corporation or corporations complained of in any other locality or localities in the state.

All matters upon which complaint may be founded may be joined in one hearing, and no motion shall be entertained against a complaint for misjoinder of complaints or grievances or misjoinder of parties; and in any review of the courts of orders of the commission the same rule shall apply and pertain with regard to the joinder of complaints and parties as herein provided: Provided, all grievances to be inquired into shall be plainly set forth in the complaint. No complaint shall be dismissed because of the absence of direct damage to the complainant.

Upon the filing of a complaint, the commission shall cause a copy thereof to be served upon the person or corporation complained of, which shall be accompanied by a

notice fixing the time when and place where a hearing will be had upon such complaint. The time fixed for such hearing shall not be less than ten days after the date of the service of such notice and complaint, excepting as herein provided. Rules of practice and procedure not otherwise provided for in this act may be prescribed by the commission.

SECTION 10423 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Hearings, Orders and Record.

At the time fixed for the hearing mentioned in the preceding section, the complainant and the person or corporation complained of shall be entitled to be heard and introduce such evidence as he or it may desire. The commission shall issue process to enforce the attendance of all necessary witnesses. At the conclusion of such hearing the commission shall make and render findings concerning the subject matter and facts inquired into and enter its order based thereon. A copy of such order, certified under the seal of the commission, shall be served upon the person or corporation complained of, or his or its attorney, which order shall, of its own force, take effect and become operative twenty days after the service thereof, except as otherwise provided. Where an order cannot, in the judgment of the commission, be complied with within twenty days, the commission may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may, on

application and for good cause shown, extend the time for compliance fixed in its order. A full and complete record of all proceedings had before the commission, or any member thereof, on any formal hearing had, and all testimony shall be taken down by a stenographer appointed by the commission, and the parties shall be entitled to be heard in person or by attorney. In case of an action to review any order of the commission, a transcript of such testimony, together with all exhibits introduced, and of the record and proceedings in the cause, shall constitute the record of the commission.

SECTION 10426 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Remunerative Charges cannot be Changed.

Whenever the commission shall find, after hearing had upon its own motion or upon complaint as herein provided, that any rate, toll, rental or charge which has been the subject of complaint and inquiry is sufficiently remunerative to the public service company affected thereby, it may order that such rate, toll, rental or charge shall not be changed, altered, abrogated or discontinued, nor shall there be any change in the classification which will change or alter such rate, toll, rental or charge without first obtaining the consent of the commission authorizing such change to be made.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES OF WASHINGTON.

Review.

Any complainant or any public service affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

HOME TELEPHONE & TELEGRAPH COMPANY OF SPOKANE *v.* KUYKENDALL, AS DIRECTOR OF PUBLIC WORKS OF WASHINGTON, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON.

Nos. 539 and 790. Argued April 17, 1924.—Decided May 26, 1924.

1. Upon appeal from decrees refusing an interlocutory injunction and dismissing the bill on demurrer, the court will not pass upon an issue not shown by the bill but only by an opposing affidavit used at the injunction hearing. P. 208.
2. Decided (in other respects) upon the authority of *Pacific Telephone Co.* v. *Kuykendall, ante*, 196.

Reversed.

APPEALS from decrees of the District Court refusing an interlocutory injunction and finally dismissing on de-

murrer a bill to enjoin interference with increases of telephone rates.

Mr. Otto B. Rupp, with whom *Mr. Frank T. Post, Mr. H. D. Pillsbury, Mr. C. M. Bracelen* and *Mr. W. V. Tanner* were on the briefs, for appellant.

Mr. John H. Dunbar, Attorney General of the State of Washington, *Mr. Thos. J. L. Kennedy* and *Mr. Alex M. Winston,* with whom *Mr. H. C. Brodie, Mr. J. M. Geraghty* and *Mr. E. K. Murray* were on the briefs, for appellees.

Mr. Chief Justice Taft delivered the opinion of the Court.

These appeals present the same question as that just considered and decided in the appeal of the Pacific Telephone & Telegraph Company against the same appellees. The bill averred that the plaintiff was a corporation of Washington, owning and operating a telephone system in the City of Spokane and territory adjacent thereto, known as the Spokane Exchange; that on September 20, 1922, it filed with the Department of Public Works a schedule of rates by which those of 1919 as approved in that year by the Public Service Commission, the predecessor of the Department of Public Works, were substantially increased; that the Department suspended the new rates and March 31, 1923, finally denied the company its application for increase, thereby limiting it to prior rates alleged to be confiscatory in character. In detail, the bill set out the cost of the Spokane system at over four millions of dollars and its present value at $5,710,684, and averred that a fair return thereon would be 8 per cent; that the actual return therefrom had been:

	On cost	On fair value
Year 1919	2.95%	2.14%
Year 1920	1.79%	1.30%
Year 1921	2.35%	1.71%
Year 1922	3.07%	2.28%

and that the order of March 31, 1923, by which an increase of rates had been denied, operated to limit it to the prior rates which it alleged were and would continue to be confiscatory. The prayer was for a temporary and permanent injunction.

These appeals were heard at the same time with the two just disposed of in the *Pacific Telephone & Telegraph Co. Case, ante,* 196, and the same orders were made therein by the District Court. There is no difference in the cases except that on the motion for a temporary injunction an affidavit of the Assistant Corporation Counsel of Spokane was filed which set forth, among other reasons for denying an injunction, an ordinance of the City of Spokane of April, 1909, in which rates for telephone service by the Home Telephone Company in that city were fixed in a schedule much lower than the one said to be necessary for a fair return, and alleged that the ordinance was still in full force and effect, was a valid contract between the City and the Company, and that thus the bill of the plaintiff must fail. Upon argument and brief in this Court, counsel for the Company insist that, under the decision of the Supreme Court of Washington in *Spokane Falls Gas Light Co.* v. *Kuykendall,* 119 Wash. 107, action of the City in reducing the rates of the ordinance in 1913 and increasing them in 1919 must he held to terminate the contract of the ordinance and bring the rates within the regulation of the Public Service Commission or its successor the Department of Public Works.

It is obvious that upon this appeal we could not safely pass upon an issue raised upon an affidavit and not shown in the bill. The temporary injunction was denied and the bill was dismissed by the District Court on the same ground as that explained at length in the *Pacific Telephone & Telegraph Company Case.* For the same reasons as therein stated we must dismiss the appeal in No. 539 as

merged in No. 790 and reverse the District Court in the latter appeal and remand the case for further proceedings when, upon answer and the merits, the effect of the ordinance referred to and other questions raised in the affidavit can be fully considered.

Reversed and cause remanded for further proceedings in conformity with this opinion.